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THE COLLECTION OF
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PRESENTED BY
HIS WIDOW
Catalina Juliana Mason Myers
HIS DAUGHTER
Cassie Mason Myers Julian-James
HIS DAUGHTER-IN-LAW
Edmonia Taylor Phelps Mason
TO THE
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ASTOR, LENOX AND TILDEN FOUNDATIONS
IN MEMORY OF
Theodorus Bailey Myers
AND HIS SON
Theodorus Bailey Myers Mason
LIEUTENANT-COMMANDER
UNITED STATES NAVY
1899

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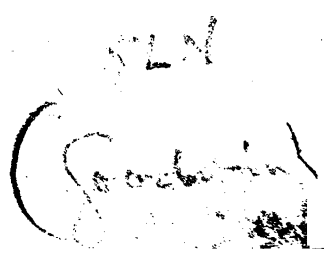
Goodwin



TRIAL.

OF

ROBERT M. GOODWIN,

ON AN INDICTMENT OF MANSLAUGHTER

FOR KILLING

JAMES STOUGHTON, ESQ.

IN BROADWAY, IN THE CITY OF NEW-YORK,

On the 21st day of December, 1819.

TRIED AT THE COURT OF GENERAL SESSIONS OF THE PEACE HELD IN AND FOR THE BODY OF THE CITY AND COUNTY OF NEW-YORK. INCLUDING THE ARGUMENTS OF COUNSEL AND OPINIONS AND ORDERS OF THE COURT ON A MOTION TO BAIL THE PRISONER, PREVIOUS TO HIS TRIAL, AFTER THE FINDING OF A CORONER'S INQUEST OF WILFUL MURDER, AND A VERDICT BY A GRAND JURY OF MANSLAUGHTER.

AND A FURTHER MOTION TO BAIL

On the Petit Jury being Polled and Disagreeing in their Verdict, and being finally Discharged at the close of the Session, after a Trial which lasted five days, having began on the 14th and ended on the 18th day of March, 1820.

AND ALSO A MOTION TO BAIL

On a Writ of Habeas Corpus before His Honour the Mayor, at his office in the City-Hall. And a like motion before His Honour Chief Justice Spencer, at his Chambers, with his Opinion and Order to admit the Prisoner to Bail.

TAKEN IN SHORTHAND

BY WILLIAM SAMPSON,

Counsellor at Law.

NEW-YORK:

PRINTED BY G. L. BIRCH & CO.

No. 39½ Frankfort-Street.

1820.

SOUTHERN DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, that on the twenty-eighth day of March, in the forty-fourth year of the Independence of the United States of America, *William Sampson, esquire*, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words and figures following, to wit:

"The trial of Robert M. Goodwin, on an indictment of manslaughter, for killing James Stoughton, esq. in Broadway, in the city of New-York, on the 21st of December, 1819. Tried at the Court of General Sessions of the Peace, held in and for the body of the city and county of New-York. Including the arguments of counsel, and opinions and orders of the court on a motion to bail, after the finding of a Coroner's inquest of wilful murder, and the verdict of a Grand Jury for manslaughter. And a further motion for bail on the Petit Jury being polled, disagreeing in their verdict, and being finally discharged; the trial having began on Tuesday, the 14th of March, and ended on Saturday the 18th."

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G. L. THOMPSON,
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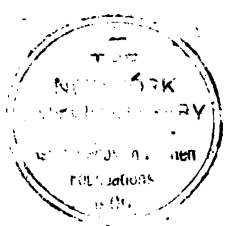

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This report was undertaken under the auspices of public favour. The compiler was desirous of making his labours serviceable to his profession and the public, and few cases had ever occurred which promised a more ample field of instruction and rational curiosity.

That he might not be a loser of labour, time, and money, as often happens to the publishers of useful works, many of the most respectable of our community became subscribers in advance upon the credit of the author. In return for this confidence, he has bestowed great pains upon the work, and fixed upon it (for the subscribers) the lowest price that it would admit of, to afford him ordinary indemnity.

It contains the proceedings of nearly ten days, and part of several nights. What the labour and attention requisite to follow, without intermission, the course of so many arguments and discussions, to transcribe from shorthand notes, in which no person could assist, so many eloquent speeches that could not but lose by omission or change, and at the same time to correct the press; and all this in the hurry and interruption of daily professional avocations, can best be conceived by those who have at any time engaged in similar labours. Some typical errors and other slight faults in transcribing will be found, as the work was hurried at the first in order to gratify public curiosity. But as none of these materially alter the sense, the intelligent reader will easily correct, and the candid excuse them. The publication has been deferred from motives that have long since ceased, since so many hasty accounts have been circulated, that justice calls for the publication of a faithful history of the whole of the important proceedings. To render the work more useful and ready of reference, an index of the principal matters is subjoined, and a table of contents prefixed, by which the reader, according to his taste, may find at any time, that which he wishes to select or refer to. And a plan is added, that those who are strangers to our city may the readier understand the subject of so many minute but essential inquiries.

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TRIAL, &c.

AT A COURT OF GENERAL SESSIONS OF THE PEACE

Held in and for the City and County of New-York, on the 18th day of February, 1820:

PRESENT,

THE HONOURABLE CADWALLADER D. COLDEN,

MAYOR OF THE CITY OF NEW-YORK,

ASA MANN AND GEORGE B. THORP,

ALDERMEN.

THE PEOPLE vs. ROBERT M. GOODWIN.

On Motion in behalf of the Prisoner to be admitted to Bail.

Mr. Stephen Price opened the motion on behalf of the prisoner. He said he rose to renew the application for bail, made on an early day in this term.

His honour the Mayor observed, that the prisoner was not before the court, and that he considered it as a settled principle, that no motion respecting a prisoner of the court charged with a felony could be made, unless in his presence.

Mr. Price observed, that from the apparent preparation, and the attendance of several counsel for the prosecution, the argument might probably be long, and the delay inconvenient; but that he was under the direction of the court.

The Mayor called upon Mr. Munro, also of counsel for the prisoner, who admitted the propriety of sending for him; and an order to that effect being made, after a short time bestowed in the ordinary business of the court, the prisoner was brought up, accompanied by his brother, captain Ridgely, and stood, during the argument, within the bar, in the space on the right hand of the bench.

Mr. Price then proceeded to state to the court, that the prisoner was on the 7th of January last, indicted for manslaughter, but was not called upon by the District Attorney to take his trial during that term. That during that term, an application was made that he should either be tried, or admitted to bail; and he was told by the District Attorney, that he was not ready to proceed to his trial. The present application, he said, was, that he should be admitted to

bail, merely and solely on the indictment, which was on the files of this court, and of which this court had full jurisdiction.

That this court was competent to try its prisoner, for the offence of manslaughter, was beyond question. The only statute which speaks of the offence, calls it an offence above the degree of petit larceny, and in this very term, some trials have taken place for the same offence, and some of the parties been found guilty, and others acquitted. The court, then, having the power to try, and to discharge the prisoner, has undoubtedly the power to make all intermediate orders. The District Attorney may enter a *nolle prosequi*, and proclaim the discharge of any prisoner whom the court is competent to try. The act declaring the powers of the Courts of General Sessions of the Peace, 1 *N. R. L. N. Y.* p. 151, § 7, enacts, that "the said Courts of General Sessions of the Peace may, in their discretion, let to bail, prisoners arrested and in gaol, in their respective cities and counties, for suspicion of felony, to appear at the next court having cognizance of the offence, and where the same ought to be tried."

It here appears then, that this court may in its discretion let to bail. The prisoner has been in confinement two terms, and ready for his trial, and the court has been in the practice of bailing in such cases. In the case of *Bowerman and others*, which must be in the recollection of the Mayor, after an indictment for grand larceny was brought in, for certain goods stolen from Mr. Beach, the District Attorney having some doubts, took the opinion of the court. I think it unnecessary, therefore, to detain the court with any further argument, as to their power to bail.

It is true, that in this case, a coroner's inquest is supposed to interfere; but that inquest being by law returnable into the Court of Oyer and Terminer, and not here, cannot be noticed by this court. Nor is this all: by the Constitution of the United States, (5th article of the amendments) it is declared, "that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger."

The Mayor. You will find other words in that article which it may be material to consider.

The counsel then read the remainder of the article: "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life, or limb; nor shall he be compelled in any criminal case to be witness against himself; nor be deprived of life, liberty or property, without due process of law."

Now, that a coroner's inquest is neither an indictment, nor a presentment of a Grand Jury, is very evident. I shall, however, confirm it, by two most respectable authorities:

In *Bac. Ab.* title Indictment, an indictment is defined to be an accusation at the suit of the king, by the oaths of twelve men at least, and not more than twenty-three, of the same county wherein the offence was committed, returned to inquire of all offences in

general in the county, determinable by the court in which they are returned, and finding a bill brought before them to be true. But when such accusation is found by a Grand Jury, without any bill brought before them, and afterwards reduced to a formal indictment, it is called a presentment; and when it is found by jurors, returned to inquire of that offence only which is indicted, it is called an inquisition. And the compiler cites in support of this definition, 2 *Hale, P. C.* and 2 *Burr.* 1088.*

Mr. Price also cited 1 *Chitty's Cr. L.* 162, to show that an inquisition could not be termed an indictment; and to show the distinction by explaining what was an indictment, and what an inquisition, and read as follows: "An indictment is a written accusation of one or more persons, of a crime preferred to, and presented upon oath, by a Grand Jury, returned to inquire of all offences in general in that county. It is the most constitutional, regular, and safe, as well as by far the most usual mode of proceeding upon criminal charges."

Munro, also on behalf of the prisoner, followed Mr. Price.

I make this application, to the discretion of the court, to bail the prisoner, upon the indictment found by the grand jury, for manslaughter. On the 7th day of January last, he was committed by the Mayor for *manslaughter*. On the 26th he was committed by the coroner for the crime of *wilful murder*. And I confine my application to that particular charge, of which this court has jurisdiction; and that only, of which he stands indicted, before this court, by a Grand Jury. I move that he be admitted to bail, or put upon his trial, as the public prosecutor shall think fit. And I shall divide my argument on this motion into these two inquiries:

1. Has this court the power to bail in cases of manslaughter?

2. Is it, under all the circumstances of this case, fit and proper to exercise that power?

If either of these be decided in the negative, my application must fail.

No doubt, I think, this court has that power. The statute, as well as the charter of the city, gives it jurisdiction. And whenever the court has the power to try, commit, and discharge a defendant, it can certainly, by the common law, bail the party ac-

---

* It is thus reported by Sir James Burrows, who it will be remembered was master of the crown office, that in Michælmas term, 1. *G.* 3. *Anno Domini* 1760: "On the Grand Jury-day, it was intended by the sheriffs, and pressed by the knights of the shire for Middlesex, that *all* the principal gentlemen of the county (not fewer than fourscore in number) should be *sworn* of this Grand Jury, in order to their being included in an address to his Majesty, from and in the name of the Grand Jury of Middlesex, upon his accession to the crown. But upon the sheriff's mention of this to me, it seemed to me to be irregular and improper to swear more than twenty-three: because, if a number amounting to two *full juries*, or more, should be sworn, it might happen that a complete *jury of twelve* might find a bill to be a *true* one, though other twelve of the very same jury might reject it as an untrue one; which would be inconvenient as well as contradictory, and even somewhat ridiculous.

Lord Mansfield being informed of this, said it would be monstrous to swear fourscore; and that the officer could not swear more than *three and twenty*."

THE REPORTER.

cused. For whence, unless from the common law, did it acquire, in any case whatever, the right to bail? This court is held, under the statute concerning the Mayors' Courts in the cities of Albany and Hudson, and the Mayor's Court and General Sessions of the Peace in the city of New-York, 2 *N. R. L.* 503. § 10. The County Sessions are held under the act declaring the powers of the Courts of General Sessions of the Peace, 2 *N. R. L.* 150. The statute then that regulates the County Sessions, does not apply to this court, and therefore the legislature did not say to this court in so many words as it did to the others, you may bail if you think fit, for it would have been quite unnecessary. And if I can show that inferior courts can bail not only for this but for higher crimes, this court may surely do so if it thinks fit. The superior courts, such as the King's Bench in England, and the Supreme Court of this state, can bail in all cases—and why? Because they have jurisdiction over all indictable offences. The right to try confers the right to bail. To show that they have that right, and do exercise it, in cases of high treason, murder, manslaughter, forgery, rapes, libels, and all felonies and offences whatsoever, the counsel read from 1 *Chitty's Cr. L. p.* 80 *of the American edition.* This power was frequently used, he said, in cases of manslaughter, and he particularly referred to the case of the *King* vs. *Magrath*, (2 *Stra.* 1242) where the prisoner was committed for manslaughter, and it appearing to be no more upon the depositions before the coroner, the court admitted him to bail, according to *Salk.* 104. The counsel also read as follows, from the *King* vs. *Dalton*, (2 *Stra.* 911.)

The defendant had the misfortune to kill his schoolfellow at *Eton.* And being brought up by habeas corpus to the Chief Justice's house, it was returned that he was committed by the coroner for manslaughter. It was therefore prayed he might be bailed. But the Chief Justice said that was no reason, for if the depositions made it murder, he would not bail: *e contra*, if they amounted only to manslaughter, he would bail, though the coroner's inquest had found it murder. And he said the distinction was between the coroner's inquest where the court can look into the depositions, and an indictment where the evidence is secret. That Lord Mohun's case in *Salk.* 104, was in point, (though that was at Holt's chamber and not in court) as the book reports it, and that the lords bailed him after an indictment for murder was found. He said that himself refused to bail Mr. Clifton, because he thought the depositions made it murder, though the inquest was manslaughter only. The bail was four in £4000, and the Chief Justice said it was usual to take them in a sum, or body for body: and when they are taken *corpus pro corpore*, it was a mistake to imagine the bail were to be hanged if the principal ran away: but that the method was to amerce them.

The counsel then referred to Lord Mohun's case, (1 *Salk.* 104,) which is thus: "If a man be found guilty of murder by the coroner's inquest, we sometimes bail him, because the coroner proceeds upon

depositions which we may look into: otherwise if a man be found guilty of murder by a Grand Jury: because the court cannot take notice of their evidence, which they are bound by their oath to conceal," &c. The counsel then proceeded:

I admit this bail is not *de jure*, but that we are applying to the favour of the court, which will bail or not as it thinks fit, under all the circumstances; and, therefore, having first shown that it has the power to bail, the next point is, whether, having this power, it will exercise it in this particular case.

We do not seek to disturb the finding for murder; to that the prisoner is bound to answer before the Court of *Oyer and Terminer*. We wish only to be set at liberty from this charge, that we may not be embarrassed with it when we apply to the superior court to bail as upon *habeas corpus* for the charge of murder. The prisoner has been already confined in close custody two terms, during which the public prosecutor might have tried him if he would. The Oyer and Terminer will not be till the month of April, and why should he be detained till then upon this charge? His appearance there will be secured and enforced: first, by the bail given here, and secondly, upon that given upon the *habeas corpus*, if he should succeed in that application; and if he should fail, by his remaining a prisoner. As to the offence of which this court has cognizance, the punishment is not greater in case of a conviction than that inflicted in many cases of misdemeanor; for punishment in the state prison is no necessary part of the sentence. If the court see fit, they may make it simply fine and imprisonment.

I know not yet what arguments will be urged in opposition to this motion; a case has been just put into my hands, the report of Mr. Selfridge's trial, (*p.* 8.) where it is said that the prisoner was recognized *de die in diem*. So it appears that in a case of great importance, and which excited such strong feelings, the court nevertheless did bail the prisoner.

The Mayor here took occasion to observe, touching the punishment of this offence, that it was only to be found in the 5th section of *the act declaring the punishment of crimes*; where it is enacted that persons convicted or attainted of burning an uninhabited dwelling house, or house of worship, or barn, or grist mill, or of any offence specified in the first section of the act to prevent forgery, the punishment whereof is not provided for in the last preceding section, or of any felony other than such as are herein above enumerated, and directed to be otherwise punished, and above the degree of petit larceny, &c. &c. shall be adjudged, on a consideration of all the circumstances, to imprisonment in the state prison for any term not more than fourteen years. (1 *R. L. N. Y.* 409.) By that section all felonies not enumerated in the statutes or sections there specified, and which are above the degree of petit larceny, are punishable by imprisonment in the state prison; for, by the 14th section of the same act, we cannot imprison in the state prison for less than three years: so that unless we punish him for three years in the state prison we cannot punish him at all.

Mr. Munro acknowledging this to be so, proceeded: If it be said that he stands indicted for murder, and that the coroner has certified the finding into this court, I answer, he has done what he ought not to have done. It was made his duty by the first section of the act concerning coroners, (1 *N. R. L. N. Y.* 150.) to return his inquisition to the Oyer and Terminer. This court, therefore, cannot take judicial notice of that inquisition. If it could, it could go further, and examine whether it was such an inquisition as the prisoner could be tried upon. And, though, in England, it may be so, and it may have been done in one or two instances in this state, yet, probably, this is the first time it has been questioned or examined. It is not, truly speaking, either a presentment or an indictment; and, I have found but one single book where a coroner's jury is called a grand jury. In *Dalton's Sheriff* they are called grand juries or not, according to the number of which they consist: if of twelve, it is called a petit jury, if of more, a grand jury. The jury, in a Grand Assize, is called a grand jury. So under the statute of forcible entry, or to abate a nuisance. And I have doubted whether the legislature did not mean to exclude a finding or inquisition of office, for all the other books make a clear distinction between them.

Blackstone (4 *Com.* 301-2.) says, "A presentment, *generally* taken, is a very comprehensive term; including not only presentments, *properly so called*, but also inquisitions of office, and indictments by a grand jury. A presentment, properly speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king: as the presentment of a nuisance, a libel, or the like, upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it. An inquisition of office is, the act of a jury summoned by the proper officer, to inquire of matters relating to the crown, upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traversed or denied, and therefore the inquest or jury ought to hear all that can be alleged on both sides. Of this nature are all inquisitions *felo de se;* of flight of persons accused of felony; of deodands, and the like. Other inquisitions may be afterwards traversed and examined, as particularly the coroner's inquisition of the death of a man, when it finds any one guilty of homicide: for, in such cases, the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it; which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely.

"An indictment is a written accusation of one or more persons, of a crime or misdemeanor preferred to and presented on oath by a grand jury. To this end, the sheriff of every county is bound to return to every session of the peace, and every commission of *Oyer and Terminer*, and of every goal delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things which, on the part

of our lord the king shall then and there be commanded them. They ought to be freeholders, but to what amount is uncertain: which seems to be *casus omissus*, and as proper to be regulated by the legislature as the qualification of the petit jury; which were formerly vague and uncertain, but are now settled by several acts of parliament."

The common law then (for it is that the author here lays down) defines an indictment to be the finding of a grand jury, found by *freeholders*, though the amount of their freehold is not specified. Our statute only says that the coroner must inquire by good and lawful men. Whether this has been so done in this case does not appear. A coroner's inquest is an inquest of office, signed by the coroner and taken under the direction of the coroner. An indictment is the finding of a grand jury under the guidance and direction of a court, with the assistance of the knowledge of the public prosecutor, and the aid of the learning and wisdom of the judges to guide and direct them. The officer in this instance is not a lawyer, for even with the statute before his eyes, he certifies his inquisition into this court, instead of that into which the constitution requires that he should certify it. When this constitution was framed it was with great care. Various amendments were proposed, amongst which this one was adopted: (*article 5, Amend.*) "That no person should be put to answer for a capital or otherwise infamous crime, unless upon a presentment or indictment of a grand jury." And if there be any doubt whether this coroner's inquisition be an indictment by a grand jury, it ought to be construed in favour of liberty and in the spirit of mercy. If this be a privilege intended for every citizen and for every person accused, let it not be infringed. Let us not undermine the ground upon which we stand, when little good can accrue to the public, but great evil to the individual.

Blake, for the Prosecution. From the various forms this application has assumed from the beginning, I shall, instead of answering every thing that has been said, simply present to the court the view I have, upon deliberation and mature consideration, formed; and, however acute my feelings may be, I shall treat the subject with the calmness and moderation which a legal investigation requires.

The application is to bail Mr. Robert M. Goodwin, who stands here indicted for manslaughter, and against whom there is also an inquisition for murder, signed by twenty-four men, in conjunction with the coroner himself; which, if it be not so in the strictness of the term, is at all events equivalent to an indictment by a grand jury; being that upon which the attorney-general may prosecute the defendant before any court having competent jurisdiction.

I shall range my argument under these two propositions, of which I shall endeavour to support the truth by reason and authority.

1. By the laws of England, as well as those of this country, an inquisition for murder by the coroner is equivalent to an indictment by a grand jury.

2. That a party charged with two offences of different degree,

cannot be bailed for the minor offence, neither by the common law, nor by any statute of this state.

By the common law, no prisoner is entitled to be bailed unless there has been a delay of justice, and this is the first session in which he has ever offered himself for trial. It is so in England, and it is the same by due construction of our laws and constitution. For I take this to be an unquestionable truth, that we have adopted every part of the common law of England that is not repugnant to our usages, and where neither our constitution nor any of our statutes has made an alteration; or, in other words, that the common law is the law of our land, unless where it may be contrary to our constitution or our statutes.

I also hold every state in our Union to be a distinct and separate sovereignty; and, being so, that every offence against the laws and peace of a state must be tried by the tribunals of that state, nor can any thing in the constitution of the United States be supposed to forbid it. This state has adopted the common law, and has retained its municipal code in every particular, except those where it has made a precise specific delegation of some part of it. And it cannot be shown that the trial or punishment of any offences other than those against the United States and their laws, can be tried or legislated upon under the constitution or laws of the United States. I shall, therefore, apply the common law and the laws and constitution of this state to the case in hand, and not the law or the constitution of the United States, which have no reference to it. And Lord Hale has laid it down (2 *Hale, Pl.* 222.) as a rule to be observed, that where there is an inquest for murder, and an indictment for manslaughter, it is usual to arraign him first for the greater and not the minor offence.

And why should not this be the law of this state? The constitution secures all the privileges of trial by jury, as amply as the *Magna Charta* of England. And the laws of this state, that right being already secured, are silent upon the subject. The framers of the constitution of the United States had to provide for the organization of the powers delegated to the general government for national purposes. They had no powers but what were delegated to them, nor could there be any laws but such as were made in pursuance of those delegated powers. It was found that the constitution had not provided for the trial by jury, which every one of the several states had previously derived and adopted from the common law. It was to assimilate the jurisprudence of the United States, to that of the individual states, in this important feature, that the amendment referred to was made.

The gentlemen had said, it was to give the trial by jury to the individual states. Had they not it before? Yes; but the United States had it not before. They could have it only from the constitution. The constitution had not established it. This omission being observed, the constitution was amended in order to supply the defect. The individual states never intended to give away their sovereignty, nor any part of it beyond what was necessary for national

and general purposes; and least of all, the power of saying whether they should or should not enjoy the right of trial by jury. And a principal reason for the adoption of this amendment was, to prevent the use of inquisitions of office, which had been so much complained of and so odious. It was, therefore, to fill up this chasm, and to give the code of the United States the same advantage as that of the several states always possessed, that it was adopted.

These arguments then, derived from the amendment of the constitution of the United States, being refuted, we return to the facts in the cause. Here are two verdicts against the prisoner for the same homicide, which no authority save the attorney-general of the state is competent to sever; nor is it competent to this court to bail upon that for felonious homicide, whilst the other for wilful murder subsists in full force. When it is laid down so clearly by such an authority as Hale, that it is not competent for any court to bail for the minor offence, nor put the party on his trial for it, till the greater is disposed of, will this court take such responsibility upon itself?

As to the complaint of delay. The *habeas corpus* act has given to every prisoner in custody, upon a charge of treason or felony, a mode of redress, if he chooses to resort to it; which is, to petition the first week of the term, or the first day of the sessions of *Oyer* and *Terminer* or goal delivery, to be tried; and then if not indicted in that term or session, to be bailed; and if not indicted and tried the ensuing term or session, to be discharged.

Now there has been no session of Oyer and Terminer, of course no petition on his part, nor delay on that of the prosecutor. And in this court the prisoner has presented no petition. And in no case of felony, after indictment found, is the party entitled to bail, unless justice has been delayed.

The counsel then read from the statute above quoted, touching the duty of the coroner, (1 *R. L.* 150.) to show that when the inquisition was returned into the Oyer and Terminer, the court were bound to proceed "*thereon.*" Whereon? Why upon the inquisition, the only thing spoken of. Upon the charge contained in that finding. This confirms what I say of the meaning of the amendment to the U. S. Constitution, and satisfies the words of it, however interpreted: since an inquisition is, to all intents and purposes, an indictment in every thing but the name. If it were not so, the law would have been otherwise expressed, and it would have said that the inquisition should be filed not to be proceeded upon, but that an indictment might be found and proceeded upon.

There have been cases, it seems, of prisoners being bailed after indictment and inquisition found; but from the days of Alfred through all the reigns of *Henrys*, *Edwards*, and the rest, has there been one solitary instance of any one like this where it was even asked?

In the two cases cited from *Strange*, and one from *Salkield*, the judges have said they would look into the depositions upon the coroner's inquest, and if they amounted to manslaughter, they would

bail; if to murder, they would not. And that though they could not look into the evidence on an indictment, the jurors being sworn to secresy, they could upon the inquisition, and would do so, and regulate their discretion thereby. When they bailed upon the coroner's inquest, then upon what ground was it? Because upon that evidence the charge was light and venial. Will it be found so here?

In *Lord Mohun's* case, the Chief Justice says he never will bail where there has been a finding for murder. And certainly it has been done in no case but where there has been preponderating circumstances to raise a strong presumption of innocence.

The Mayor here adverted to a case where *this* court did bail after an indictment for felony. There the prisoners were brought into court by their bail and delivered up by them; or as it would be termed in a civil case, surrendered, that is, brought in by their bail in discharge of their recognizance. Two persons were bailed because the magistrates had thought it a fit case for bail, and the court did not think proper to interfere: but there is no case where a party has been fully committed for a felony, that he has been bailed as of course, though there have been many applications to this court. I have always said that it was not of course, but at the same time, that the court have not the power to bail, is a position that I deny.

Price. In the case cited of *Bowerhan and Fitzgerald*, the court thought proper to order one of the defendants to be bailed and the other two to be committed.

The Mayor. Those two persons were merely continued over upon bail, which was nothing more than not undoing what the magistrates had done, we conceiving that they had exercised a just discretion.

Price. Still it serves to show that the court will bail after an indictment found.

Blake. There may and must have been a great many cases in criminal law, where there has been little consideration. And such, perhaps, was this, where the court did not so much exercise its own judgment as acquiesce in what had been done, being not inclined to undo what the magistrates had done. But I still maintain that there has been no case where there was a finding by a coroner of wilful murder, and the court have bailed without looking into the depositions upon which it was found. And if the court has looked into these, what has it seen? Was there not premeditated malice? Was there not a letter from the prisoner, when in gaol, fraught with vengeance? Was there not a challenge afterwards to fight a duel, which the law, in case of death, has pronounced to be a murder? Was there not an exchange of canes, and was not the deadly weapon received in this exchange the same that was driven through the heart of the deceased? Was there not a parading in Broadway in order to waylay him? Was there not an assault in open day and in the public street, with an upraised weapon and provoking words? And when the deed was perpetrated, did not the slayer fly?

Mr. Price here interposed, and appealed to the court whether these topics were relevant to the motion, and whether the counsel should be permitted to inflame the minds of the by-standers by assertions that were not warranted by any thing at present before the court.

Mayor. Whenever the question comes to be considered whether the merits are such as to influence the discretion of the court, it may be right to examine into the merits. We will first decide the preliminary point, whether by law, without entering into these particulars, the prisoner may be bailed, or whether he cannot.

Blake. This honourable court will, I trust, at all events, before it will decide to bail, look into the record.

The Mayor. Supposing the court should decide that it can bail, then it will depend upon the merits whether we shall think it fit in this case to exercise that power: but we must first know whether the coroner's inquest is so far before us that we can look into it.

Mr. Blake proceeded no farther, and *Mr. Munro* begged leave, before the other counsel for the prosecution went on, to submit to the court the concluding phrase of the sixth section of the "act to prevent unjust imprisonment, by securing the benefit of the writ of *habeas corpus*," which is in these words: "And if any person indicted as aforesaid shall not be brought to trial at the second term of the sessions, or first court of *Oyer* and *Terminer* after his commitment, he shall be discharged as far as relates to any treason or felony for which he was committed as aforesaid, unless satisfactory cause be shown by the public prosecutor for not bringing him to trial." (1 *R. L. N. Y. p.* 356.) *Saying nothing of presenting a petition.*

Griffin, for the Prosecution. It has been correctly decided, that in felonies above the degree of petit larceny, the accused person has not the right to be admitted to bail *de jure.* The ordinary, the natural course is, not to bail when the party is committed for treason or for felony. Not only it is not matter of right, but the natural course is not to bail the prisoner, which is manifest from the *habeas corpus* act itself, which goes as far as any other act in favour of the liberty of the citizen. All persons committed for treason or felony plainly set forth, are not however within that pale of the subject or the citizen. That statute gives the right to the prisoner so committed, when there has been a delay of justice, and he has followed the course specifically pointed out. The *onus* always lies upon the applicant, who must show some strong and cogent reasons why one so accused and charged should not answer in person the penalties of violated law. The history of bail is this: In the barbarous times of the 12th and 13th centuries, all persons were admitted to bail, and the consequences were enormous; and nothing could better prove the viciousness of that principle, than the disorder of those times, till the *I. Edward* put an end to such licentious impunity. In the year 1275, the statute 3 *Edw. I. c.* 15, called the statute of *Westminster* 1, was made, and soon after followed by the statute 6 *Edw. I. c.* 9. By these statutes, the

power of bailing in treason or felony is taken away, except in one class of cases; that is, where there is a reasonable presumption of innocence. But where there is a presumption of guilt, the power of bailing is not legally in any court, either in England or this country. If in such cases courts will venture to unlock the prison doors, and send forth the criminal to prowl upon the community, and perpetrate new crimes against society, they do that which, reasonably speaking, they cannot do. They do it because they have the physical power merely.

Hawkins says, (*Pl. Cr. b.* 2. *c.* 15. §. 39 & 40.) that bail is only proper, where it stands indifferent whether the party be guilty or innocent of the accusation against him, which it often does before trial; but when that indifference is removed, it would be absurd to bail him. And the 53d section of the same chapter is to the like effect. And in cases of homicide, if the prisoner is clearly the slayer, and not merely suspected to be so, this is said not to be bailable, although it appear to the justice that the killing was in self-defence; though the latter position seems questionable. (1 *Chitty Cr. L.* 95.) And in *p.* 96 it is said, persons guilty of affrays may be bailed or not, at the discretion of the magistrate; but he ought to be very cautious how he takes bail, if a wound is given from which death may probably ensue. And in *p.* 99 this author again says, after recapitulating the plenary powers of the justices of the King's Bench, that it is not usual for that court to bail in cases of felony, unless when, in consequence of the defect of the commitment, and of the examination and depositions, it appears doubtful whether any offence has been committed.

And though the statutes do not nominally reach the judges of the superior courts of Westminster-Hall, nor those of the superior courts of our own country; yet, though not expressly named, they take those statutes as their rule. (*Hawk. Pl. Cr. b.* 2. c. 15. §. 79. 1 *Chitty Cr. L.* 98.) And accordingly, in the use of their discretionary power, they bail when the statutes give the right to bail, and refuse when they prohibit; for they were not intended so much to abridge the power of justices and sheriffs, as to fix the principles of criminal law. And the principle stated by *Blackstone* (4 *Com.* 298) is unanswerable; that the law visits the person, and not the purse of traitors or felons. And that offenders shall not substitute their money for their persons, when they have rendered their persons responsible by their crimes. The majesty of the law is insulted in such cases by the offer of money; and although the statutes may only speak of justices and sheriffs, and the superior magistrates may have a higher discretion, yet certainly they will never feel themselves less interested, or think themselves less bound to vindicate the law.

And what a principle it would be to establish, that the poor man should be taken, committed, tried, convicted, sentenced and punished, whilst the wealthy culprit has only to calculate how much it will cost him to gratify the worst passions of his nature! But I forbear for the present making any application of these principles. It

may be we shall be obliged to go into the merits of this particular case in the course of this proceeding; for the present I refrain.

The King's Bench, it will appear by the reports, has uniformly refused bail in all such cases; unless where some extraordinary circumstances have given them cause to believe the prisoner was not guilty.

In a case where the prisoner stood committed for stealing, or receiving stolen goods, which was by statute made punishable with transportation for 14 years, where the law was not altogether free from doubts whether his offence was felony, yet bail was refused by the King's Bench. (*King* against *Wyer*, 2 *D.* & *E.* 77.) The offence in its worst aspect was not as grave as this manslaughter.

And in a case of still lighter character, where the principles were more developed, and better defined, the case of the *King* against *Marks and others*, (3 *East*, 157.) certain journeymen clothiers were charged with administering oaths, not specifying the offence. But the depositions which were returned into the King's Bench, with the writ of *habeas corpus*, stated the offence very fully, which was not to divulge the secrets of an association, or committee, of a combination to raise wages. The prisoners were not committed for felony. There was much debate whether the charge amounted to felony, or was within the act of parliament at all, which made it an offence. The judges themselves doubted, and yet they remanded the prisoner, because they saw no reason to doubt the truth of the facts; and being committed for what might be a felony, and no presumption that they had not done the acts charged, there was not that presumption of innocence which could induce the court to bail them.

I have so far endeavoured to establish two propositions:

1st. That the British statutes which marked the transition from anarchy and terror, to justice and good order, are of the essence of our code. That the regulations which took from the rich the power of perpetrating wickedness with impunity, were not abandoned by our forefathers, but that they brought them with them as the foundation stones of their future freedom, and transmitted them as a birthright to their posterity; and that their posterity has, and ours, I trust, will, cling to them as to the religion in which they place their hopes.

2d. That unless there has been a reasonable presumption of innocence, even when it appeared that the prisoner had committed a felony, and that felony of the lightest and most doubtful kind, bail has been refused.

I then come to the cases of manslaughter.——It would be passing strange indeed, if the law had created an exception in the instance of manslaughter, which takes in all the range between the excusable act of self-defence and the horrid crime of premeditated murder: in its lightest degree it is a felonious homicide, and certainly above the degree of petit larceny. In the graver instances, it comes so near the atrocity of wilful, deliberate, and premeditated murder, that we look in vain into the transaction, in

vain into the nature of the human heart, to find the shade of difference.

There are but three reported cases where the party accused of manslaughter has been admitted to bail. In the case in Massachusetts, it appears to have been by consent.

In *Rex* vs. *Dalton*, (2 *Stra.* 911) a boy at Eton school had had the misfortune to kill his schoolfellow, possibly, and probably in some boyish sport. By the course of the law he was arrested, and an indictment was found for manslaughter: and doubtless there must have been such circumstances as created a presumption of his innocence.

In the two other cases from 2 *Stra.* 1242, and 1 *Salk.* 103, it does not appear what the circumstances were. They may have been such as to ensure the pardon of the prisoner. Can these authorities then warrant an inroad on long prevailing and justly cherished principles? I am still going on the supposition that this court has the same power as the highest courts in England possess, to bail in criminal cases. In the case of the *King* against *Keat* (1 *Salk.* 103) "the prisoner was indicted of murder, and also of stabbing, and the jury found him guilty of manslaughter, and as to the rest, found a special verdict: and bail was denied, for he was expressly found guilty of manslaughter, and in that case bail is never allowed till clergy had."

By the report in 5 *Mod.* of the same case, it appears that it was urged to the court that the prisoner was a man of quality, which means, of the order of the nobility, or of a noble family; something above the common order; but that went as it ought to do, for nothing.

Elementary writers, long after those loose notes were written, have deduced the true consequences, and given the doctrine as established by the decisions most approved of in their time. And *Hawkins*, speaking of the *Stat. Westm.* 1, says, that notwithstanding neither the Judges of the King's Bench, nor those of any other *superior* court of justice are within the purview of it, yet they will always, in their discretion, pay a due regard to the rules prescribed by it: "and therefore," he says, "it is difficult to find an instance where persons attainted of felony, and convicted thereof by verdict, general or special, or notoriously guilty of treason or manslaughter by their own confession or otherwise, have been admitted to the benefit of bail without some special motive to induce the court to grant it."

In *Com. Dig.* title Bail, *F.* 3, it is laid down that the King's Bench will not bail for treason or murder unless there be a reasonable cause.

"And where a man is accused only of manslaughter and *non liquet* that he committed the fact, he may be bailed."

How far the examination of the facts in this cause, and the application of these principles to the case, may become our melancholy duty, I do not now say. If it does become necessary, it will give me nothing but pain and anguish.

I have now examined the principles generally upon which bail is allowed, and endeavoured to bring them home to the case of manslaughter; and to show how far the King's Bench, which has the most ample range, would feel themselves empowered to bail in a case like this. I have appealed to one principle which is incorporated in the very foundation of the criminal law, too ancient, too good, too sacred to be disrespected. God forbid it ever should. No court, however high its power, has yet presumed to take away the lien which the law has on the person of the prisoner, and give in its place a mere lien on his property, unless there be at least some reasonable presumption of his entire innocence. The counsel have not attempted to show any thing of this kind. They have very judiciously precluded all inquiry into the evidence, but they ask of the court to bail a prisoner who stands simply indicted for unlawfully taking the life of his fellow citizen, and they offer no tittle of evidence that could create in the breast of charity itself, which hopeth all things and is willing to believe all things, a hope that the prisoner is innocent of that charge at the least.

The argument founded upon a supposed delay of justice, I answer in a word. The prisoner was arraigned on the eighth of January. He was called on by the district attorney and asked if he was ready for his trial: and his answer was, that he was not.

Mr. Price. The counsel's statement is incorrect as to this fact. The prisoner, on the Monday following his arraignment, gave notice to the district attorney that he was ready for his trial.

Griffin. At the opening of the session the prisoner was arraigned, and asked if he was ready, and publicly announced that he was not. It would be sufficient to say that he had not put himself upon the right that the statute gives him, to petition for his trial and be bailed, and finally discharged in failure of the public prosecutor to bring on his trial. He has not put himself upon that right which the statute gives him, yet asks it of the court.

Far be it, however, from me, or any person concerned in this cause, or having any agency in the prosecution, to delay it for a moment. We put ourselves upon the broad position, and call upon the counsel for the prisoner to negative any part of it.

I might ask, would this court explore new ways, and make new precedents, where courts of universal jurisdiction had never adventured?—when a higher tribunal has jurisdiction and present cognizance of the offence?—when the attorney general has declared his intention of trying this very prisoner for the very same act, at the very next ensuing court of Oyer and Terminer?

The statute authorizes bail when there is but suspicion of felony; so far only it goes. Does the unfortunate event here admit of any uncertainty? Does the accusation rest upon suspicion? He stands indicted by a grand jury of manslaughter: and twenty-four men, by inquisition taken upon their oaths, have pronounced him guilty of murder. Is that nothing but suspicion? Is not our law the same as that of England on this point, or wherein

does it differ? Does it not use the same words of exception in designating the persons to be bailed, as the *stat.* 1 *Westm.* 3 *Ed. I. c.* 15. viz. "persons in custody on light suspicion?" (See the act declaring the powers of courts of General Sessions of the Peace, 2 *N. R. L. N. Y.* 150. § 7.)

Let us see then, whether in England the court of Oyer and Terminer, extensive as its jurisdiction is, has the power to bail in manslaughter, though the court of King's Bench may do it in their discretion. (*Armstrong* vs. *Lysle*, 1 *Salk.* 61.)

The judges of this court here, on the first day that this was stirred, expressed strong doubts of their power to bail in any case of manslaughter. But here, at all events, is no ground whatever, no delay, no presumption of innocence; and the question is no other than this: whether this court will exercise a prerogative which the Oyer and Terminer in England do not assume, and which the highest court of criminal jurisdiction do not exercise, except where there is evident and plenary presumption of innocence.

Thus far I have considered the case as of a simple indictment for manslaughter, but there is another melancholy feature, which cannot be overlooked. There is upon record an inquest found by a coroner and twenty-four men on oath, that the prisoner is guilty of wilful murder. To which the only answer given is, that it is not officially before the court; and, therefore, that the court will not take notice of it. What! in an appeal to the discretion of the court, to bail a man presented for manslaughter, where the court must not bail but upon the circumstances of the case, and strong presumptions that he has not committed the offence he is charged with? Are the court to shut their eyes against the evidence of a record of their own, which pronounces him guilty of the same act in a still more aggravated sense? In an appeal to the *discretion* of the court, the gentlemen are too well read in law to put their application upon any other ground. Can judicial magistrates shut their eyes against what all the world are bound to know and notice? A record! and not only that, but one filed in their own court and under their own eyes. If the whole community, if the whole world are bound to recognise it, can it be asked of this court, whose knowledge of it is most unavoidable and necessary, whether it ought strictly to be filed in this court or the Oyer and Terminer, to blot out all knowledge or remembrance of what they see as it were before their eyes?

Let us see how this would be considered, and how the proceedings would be in England; and it will be then only to see whether in this state, or in the United States, there is any thing that has altered that law or prescribed any different course.

The counsel here read from 1 *Chitty's Cr. L.* 163-4, to show that the prisoner may be indicted upon either finding, and if acquitted on the one, to plead a former acquittal when arraigned on the other. And the case of *Mary Cole*, from 3 *Camp. N. P.* 372, where the prisoner was charged with concealing the death of a bastard child. The bill of indictment was not found, yet the court tried

the prisoner on the inquisition, and inflicted the punishment due to the offence.

Now, if such be the law and the practice in England, why should it be different with us? The amendments to the constitution of the United States do not touch proceedings in the state courts. The first article does not say that state legislatures shall not make such and such laws, but only means that *congress* shall make none such. And in the same sense is the 5th article to be understood, when it says that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or militia in actual service," &c. Answerable where? Surely in courts instituted by the general government, under the powers given by the constitution, and administering that constitution and the laws of congress within and under the authority and jurisdiction of congress, and no other where.

By the 10th article, "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." And by the 11th, "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state." Thus do all those provisions begin, proceed, and end, in nothing else than restraining and limiting the extent of the delegated powers of congress; and are intended to show the extent of what was given, and what remained in the great reservoir of the state governments and constitutions, and in no other manner do they concern the original jurisprudence of those states. What has any state to do with the naval forces? Can the bill of rights of a state be for nothing? Or is it not there we should look to see if there be any thing confining trials in all cases to indictments by grand juries?

The 4th section of the act concerning the rights of the citizens, or the Bill of Rights of this state, says, that "no person shall be put to answer without presentment before justices, or matter of record, or due process of law according to the law of the land."

The third had said before, that no *citizen of this state* should be taken or imprisoned for any offence upon petition or suggestion, unless it be by indictment or presentment of good and lawful men of the same neighbourhood where such deeds be done, in due manner or by due process of law. Here is a provision that presentments shall be by *good and lawful men;* and that proceedings shall be in due manner, and by due process of law. And the counsel have admitted that convictions have taken place in this state, founded upon coroners' inquisitions. We cannot suppose these to have been against the law.

And where is the hardship? If he can make his innocence appear, he must be acquitted. The point upon which he will be tried is not now before the court; nor is there a wish but that the most pure unmingled justice should prevail, be tried where and

when he will. It is enough for the present, that there exists a record containing a charge upon which he may be arraigned and tried, and upon which this court has not jurisdiction to try, nor yet to bail: for as I have shown, this court in so doing would do what a court of Oyer and Terminer in England would not have the power to do. When this record is accompanied with another, now upon the files of this same court, containing a charge of murder in the most solemn form, can this application succeed? Suppose this inquisition could not be proceeded upon, does it not at least go to fortify the presumption of the guilt of manslaughter? The one instrument charges manslaughter, the other accuses him of murder. Twenty-four men on each jury would amount to forty-eight, who all concur that he was at least guilty of manslaughter. With these accumulated proofs, and nothing to oppose, can the court be called upon, without hearing an affidavit, or being apprised of any circumstance to modify or qualify the case, to deviate from the regular course, and disregard that controlling principle that governs in all cases of bail, and to unlock the prison doors before the day when the traverse jury shall be sworn to pass upon their oaths, and a fair trial be had between the people and the prisoner? I cannot for a moment believe, I say it with great deference, that this court will adopt a proceeding, which must not only shock the human understanding, but overturn principles of law and public security, hallowed and sanctified through the lapse of eight hundred years.

The Mayor. I have been of opinion from the first, that the coroner's inquest was improperly put upon the files of this court; but the same officer who prosecutes here, has power in every part of the state. There are statutable provisions that the party shall be bailed where there has been delay, unless that delay shall be for certain specified cause. Now it may be necessary for us to examine whether there has been delay; and if so, whether it has been accounted for. The public prosecutor may say, I have not put him upon his trial here, because of the coroner's inquest, on which he is to be tried at a higher court, for a higher offence; and this inquest may be brought to our view (supposing it not a record of this court) by the suggestion of the coroner himself.

Munro. If the court should determine to look into it and take judicial notice of it, I should then pray that the testimony should accompany it.

The Mayor wished the counsel to look into the case of the *Commonwealth of Pennsylvania* against *Oswald*, where there was much able discussion (if he recollected rightly) of the amendments of the Constitution of the U. S. and where they were held not to apply.

N. B. The mayor afterwards recollected that the case he alluded to turned upon the Bill of Rights and Constitution of that state, and not upon the Constitution of the U. S. or its amendments.

Wells, for the prosecution, begged to know if it was in order that he (being the third counsel) should address a few observations to the court, which he said should be very brief.

The court considering this as a criminal case of novelty and importance, desired him to proceed.

He then stated that he had not been in the city when the former discussions and proceedings took place, and had returned too late from Albany to make any preparation for an argument, and would submit to the court, without entering into details, the views he had formed upon general principles, and the conclusions he drew from the authorities which had been offered, and perhaps a few others. He would ask first, under what circumstances this application was made? Was it a case of one committed upon suspicion merely? No! that is not at all the ground alledged. For the accusation no longer rests in suspicion, but is resolved by a regular judicial inquiry into a solemn impeachment, to which, by the law of the land, the prisoner must answer. I mean now to view this question independently of the coroner's inquest, upon the ground of the indictment alone. Then it stands thus: instead of its being a mere case of suspicion, it is a case of one against whom an indictment has been found, upon which he is to be tried for a felony of no ordinary grade, which approaches sometimes so near in its character to the atrocious crime of murder, that the shade which forms the distinction is sometimes hardly perceptible. Whether the case we have now in hand be a case of that kind, I shall not now discuss. It is enough for my argument that he stands before the court charged with a felony of a very serious character, and whether, upon an application to the favour or discretion of the court, he ought to be bailed.

This, which is called the favour or the discretion of a court, is not an exercise of arbitrary will or pleasure. It is not enough for the court to say *sic volo* or *sic jubeo*. If the term were taken in that sense, it would be a word expressive of the most degrading tyranny. If it was free to open the prison doors for one individual under the very circumstances that closed them on others, it would be either partial on the one hand, or cruel and unrighteous on the other. It is only the circumstances and facts in the case, and not the situation or fortune of the accused that should be the ground of exemption from the ordinary rule. If the ordinary course is to bail prisoners after indictment found against them for felonious homicide, then all should be bailed: if it be not of course and right upon that ground, it cannot be so in such a case as this or any other, while sound discretion prevails and presides in the tribunals of justice and of law. For where are the special circumstances! where the single fact to induce the court to depart from the general rule, and upon any principle of sound discretion to extend the favours of the law towards him—that favour which only belongs to cases where the matter stands indifferent, and the circumstances raise a presumption in favour of the prisoner's innocence? What is there here to make it stand indifferent? What presumption that the prisoner may not be guilty of manslaughter? What of his innocence? If neither—then he is no object of that favour which is appealed to on his behalf. It cannot be inferred from the oaths of

the grand jury. Certainly, the finding of the coroner's inquest by twenty-four men upon their oaths, does not diminish the probability of his guilt. What other grounds then are there upon which to rest this claim to so unusual an indulgence? In what case of a similar description has the power of bailing been ever exercised? Has any such case been shown of a prisoner indicted for manslaughter and found guilty of murder by a coroner's inquest, and yet admitted to bail?

Neither of the cases in *Strange* or *Salkield*, are the slightest warrant for such an application. They merely show that a court having competent power to bail, will do so where there is strong presumption of innocence; and that, on a finding by a coroner, the court will bail where it would not, were the same matter presented by a grand jury; and for the reason there given, that the coroner's jury not being sworn to secresy, the court can look into the depositions and see to what they amount: so that, though it be found murder, they may see it not to be so and admit to bail, and though it be found manslaughter, they may think it murder and refuse. But here is a record which the court cannot pass over; and, if the inquest be any thing, it cannot be less than presumptive evidence of guilt, and not of innocence.

I repeat it then, that what is now asked is what never yet was done: that is, for the court to bail a prisoner who stands before it indicted of manslaughter, without a single circumstance tending either to mitigate or excuse, or any presumption whatever of innocence; nothing to mask the nakedness of the fact, or lighten the shade of guilt. (The counsel then commented upon the cases with much acumen, and proceeded:)

The court then knows nothing, sees nothing, but an inquisition for murder and an indictment for manslaughter. But the one is said not to be before them: and the other is certainly not bailable of *course*. And if the inquisition be not before them, then neither can the depositions that accompany it. They are indeed expressly shut out by the prisoner's counsel themselves from the view of the court.

I have now argued as if the coroner's inquest had been for manslaughter only. Yet, upon the finding by the coroner, and the indictment together, it is settled law, that bail will not be allowed, at least where there are no other circumstances to justify the measure. I shall, therefore, dismiss this point, confident that if the inquest be laid out of view, and the indictment alone considered, the court cannot, without violating a great principle of law, admit to bail, and therefore will not do it.

2d. I will now inquire what effect this inquisition ought to have? We are told it ought to be laid out of the case for every purpose. That the court should shut its eyes upon it. That it belonged to the Oyer and Terminer; and if it were here, the court would take no notice of it. Suppose, however, that it remained in the coroner's hands, and he stood here as a public officer, and presented it to the court, would they not be bound to notice him and it? It is enough that there

is such a finding; what it may be, or what its effects, it is not now the time for me to discuss or the court to decide. It appears sufficiently and judicially, whether the court find it upon their own files, or receive it from the officer in open court on behalf of the public. The gentlemen admit the right to bail to be commensurate with the jurisdiction to try. This court then cannot try; and, consequently, cannot bail for the offence there charged; and to what purpose bail for the minor offence, when the prisoner must remain in custody upon the major? Would it not be an idle act indeed, to inquire into the merits, since this court cannot bail whether those merits be disclosed or not? The lesser is merged in the greater accusation, which cannot be tried here. That tribunal only can bail which has jurisdiction co-extensive with the charge: and what is that tribunal? The Supreme Court, or one of its judges, can alone bail upon both offences charged, and of course upon either. Because, when they exercise their power on the greater, they at the same time necessarily dispose of the lesser. Here it would be reversing the order. But it is not only because the Supreme Court has jurisdiction to try for murder that it has the power to bail, but because it is the great judiciary, the high and paramount tribunal to which the largest powers are given; which corrects the errors of inferior courts, and to whose wisdom and scrupulous justice that great and discretionary power is only confided.

The authority in 1 *Salk.* 60. establishes this as the true principle; because by that it appears that the justices of Oyer and Terminer, though they have the well known power to *try*, have not power to *bail* for murder. If this be law then, it cuts up by the root the main hypothesis of the counsel, that the right to bail is co-extensive with the right to try; and that tribunal which can dispose of the whole subject is certainly the most proper to be applied to, because it only can give effectual remedy; whereas it is otherwise a splitting up of a motion applying to one tribunal for partial relief, and for another portion to another.

It is then enough that this court knows that there is such a record; it cannot both know of it, and act upon the ground of having no knowledge of it; it cannot look beyond it, and examine into the evidence upon which it is founded. Indeed, it would be in vain; since even if it should think the offence bailable, the prisoner must remain in custody upon that charge on record, which rebuts all presumption of innocence. The most that can be inferred from any of the cases cited, is to this amount: that where there is an inquisition finding the crime to be murder, the King's Bench, or its judges, may look into the evidence and bail, if they find the offence bailable; but that no other court or judge can do so; not even the Oyer and Terminer, though it has power to try the offence. As this court has neither power to try nor bail, it would be nugatory to examine the inquisition or the evidence, as it would not advance them one step in deciding whether the prisoner was to be bailed or not.

I have shown, that upon the indictment for manslaughter singly,

independent of the inquest, there is no ground for favour, or what is called discretion, to deviate from the regular course of proceeding, and still less is there when the charge is coupled with another beyond the reach of this court, and which must be disposed of by a jurisdiction alone competetent to try or examine the merits of that charge, and the amount of the presumption of guilt or innocence.

It is said, this court will not notice this inquisition, because it has no jurisdiction to try the prisoner upon it. Is that a reason why this court should assume jurisdiction to decide, that notwithstanding that instrument, the prisoner is bailable—why it should determine without having jurisdiction to try, to execute a power which the court that has jurisdiction to try, would not perhaps venture to assume? Will not this court rather leave that delicate question to that which has full jurisdiction to try and pronounce in the first instance, leaving it still open to the party to appeal, and be redressed if he is wronged, where all errors can be rectified? Is it not better than in the very incipient stage to stop the cause and decide that the record is not sufficient, and that no court has power to convict upon it? Yet so the court must decide if it looks into the merits of the inquisition, and having done so, admits the prisoner to bail. Of such importance to the true course of public justice, is the right decision of this preliminary question.

It is enough that authorities show, and that it is admitted, that the prisoner may be tried upon that inquest in a higher court. Suppose it now called on for trial at the Oyer and Terminer, and these exceptions are not there taken; will not the trial proceed? But they will be taken! Be it so; and which is the most fitting, that they be then decided by that court that can try the cause, or here now in anticipation by this court, which has no jurisdiction of it. Will this court run so far ahead to decide upon principles of law of such importance, where the consequences cannot be foreseen?

The objection founded on the amendments of the constitution, bears its own death-warrant. Neither clerk nor layman can mistake their interpretation, notwithstanding the doubts that ingenuity has attempted to hang upon their construction. He that runs may read. It manifestly refers to offences under the laws of the United States. One word for all will prove it. It refers to land and naval forces. Can that refer to any thing but the United States? What naval force has any state? Let that suffice, without wasting any more time to show what was the subject referred to, and meant to be regulated by that amendment.

The history of the passage of those amendments forbids any other interpretation. The principles and opinions of every individual concerned in the passage of those amendments, is known. They grew entirely out of the jealousies of the states which feared that congress, or the general government, would not merely exercise the power delegated to them, but exceed it and encroach upon the rights and sovereignty which the states had not thought proper to commit to them, and perhaps enact laws not confined to general and national purposes, as was intended, but interfering with their

respective municipal laws and constitutions, thereby altering the state laws in things which they would not have altered, and gradually abridging or overturning their sovereignty. The whole scope, quality and bearing of the amendments, therefore, was to lay more definite conditions and restraints upon the exercise of that limited power. None of those amendments, on the other hand, were ever supposed to have been for the purpose of abridging any part of the sovereignty of the states. They were merely to prevent congress from any act that might derogate from the state sovereignty. It was speaking to congress in these words: If you proceed to establish a system of penal laws for the United States, we consent, provided you confine your operations strictly within the authority we have delegated to you, that you never exceed it, nor lose sight of the purposes for which it was entrusted to you; and never attempt to alter the state laws or constitutions, or abridge the state sovereignties in any manner.

If, therefore, at the time those amendments were made, the courts could proceed to try a prisoner upon a coroner's inquest, or by information, so can they now; because no new power was given by those amendments. Their language is negative: their object was to prevent that very thing which they are now said to have effected; and this is so universally true, that it is impossible to use any one of the amendments to any such purpose.

I have now stated those general principles upon which I think I can certainly rely; if the court will apply them, this motion must be refused.

Munro, in reply. Probably justice to myself may excuse me in stating, that I was only yesterday retained; I have, of course, had little time for preparation. If I should reason desultorily, or quote less accurately than I could wish, the court, I hope, will grant me its indulgence whilst I briefly reply to the arguments of the counsel for the prosecution.

It was observed by one gentleman, that the *natural* course was *not* to bail for felony or treason. Why is it the natural course? Is it because nature indicates that course? If I were to consult my nature, it would tell me that the best course was to use fit and rational means to bring the accused to a fair trial; and that those means were most proper which would prevent him suffering more by previous confinement than probably would be the amount of his punishment even should he be convicted; where it might happen that after a punishment by imprisonment for months, the jury might acquit the person so punished, of all crime or guilt. Nature, and reason, and justice, are, I think, all equally opposed to such a course. Despotism may prescribe such a course, but it was not the course of the common law. It was not that, established by the hardy sons of Germany, who delivered down to their posterity the principles of the common law, which our ancestors brought with them as their birthright, and which, through them, we now enjoy as ours. But this is a question of dry law, and not of expediency nor of speculation. The court will banish all sympathies and feel-

ings in such a case, and not permit counsel to harrow up the public mind.

That all men were presumed innocent till they were found guilty, I had supposed to be the mild maxim of our law. And therefore it was, that, applying to the favour of the court, I hoped it would rather have said to the public prosecutor, what have you against the prisoner that rebuts this presumption of the law, than call upon the prisoner to rebut the presumption of his guilt. And when I said that the court should call for the inquest and read the evidence, I hoped that the court would have perused it silently, and pointed out to the counsel in what it did or did not appear important or sufficient, and that we should not have been called upon affirmatively in the first instance to show our innocence.

I have not lately had occasion to examine the statutes of *Edw. I.* But if I remember rightly, they only went to regulate the duties of coroners, sheriffs, and justices, but prescribe no rule to the tribunals that try the accused. The judges of the Supreme Courts, the King's Bench, Common Bench, and Exchequer, do not follow, and are not bound by them; because, having jurisdiction to try, they have power to bail, and form their own rules.

It has been said with some triumph, that by a case which I cited, (*Armstrong* vs. *Lysle*, 1 *Salk.* 60.) it appears that the court of Oyer and Terminer have not power to bail. The counsel did not distinguish nor perceive that that was a case after conviction.

(*The counsel read the case, concluding that the party had his clergy, and was burned, and then bailed.*)

Griffin asked whether the counsel read from the text of the book.

Munro. There is not, I venture to say, such an expression in the whole of the case, as that the court cannot bail because it cannot try. He again read, "In such a case as this." As what? Why when a verdict had been pronounced finding the prisoner guilty of manslaughter! And it will appear (he added) that the bail required in that case was not to the indictment, but to an appeal. It was indeed urged by the appellant, that he ought not to be bailed, because he was *found guilty* of manslaughter. But the court then said, that though the *Oyer and Terminer* could not bail in such case, that court (the King's Bench) could, and he was bailed on the crown side, and the appeal lost.

Still less is the *King* against *Hunt* (*Salk.* 103) an authority for refusing bail here, for there it was the case of a man indicted of murder, and also of stabbing. He was *expressly* found guilty of manslaughter, and a special verdict as to the rest. He could not be bailed till his clergy was allowed. What then? because a man *convicted* could not be bailed before he had been put to read and have his clergy; is that an argument that one committed merely for safe keeping till his trial, may not be bailed?

The case of the *King* vs. *Dalton*, (2 *Stra.* 911) was relied on as an authority, that it was incumbent upon the prisoner to show something in mitigation before he could ask to be bailed. Now it merely shows that the court or judge will bail where a coroner's inquest

finds murder, if, upon looking into the depositions, it appears no more than manslaughter. Here the judge, at his own chambers, for the guidance of his own conscience, looks into the depositions taken by the coroner, and without regard to the signing or sealing of the twenty-four men, exercises his own judgment, as all the books agree that he may do.

I have expressly admitted that the statute cited by my associate counsel, did not apply to this court. But I did not say that this court could not take notice of the inquest. I meant that either they ought not to look into it, since it was not before them, or else if they did notice it at all, they ought to examine critically whether it was such a legal instrument as they were forced to give credence to, and to be bound by. And, suppose it entirely defective or void: that it was a finding by eleven men, or by twenty-four with the coroner, *but without their seals*, would this court notice it? For certain purposes they would decide upon it, but not for others. They would not try nor give judgment upon it. But where it was pressed upon them as a matter to influence their discretion and operate against liberty, they will then see whether it be what it purports to be, or something else to which they cannot give credence or weight. I said this court would never finally dispose of it: I say so still. It will not quash it, it will not direct an acquittal upon it, nor finally discharge from it. And in this way only I meant to say that the court would examine it.

I admit it to be the daily practice in England, to try upon the coroner's inquest; and that the defendant must be tried upon it, unless it be illegal or defective. I admit the adoption of the whole common law of England, with the exceptions of our own statutes and constitution, when they differ in any part. And I admit that our own bill of rights is the law of this state, unaltered by the constitution of the United States or its amendments, the same as it existed long before that constitution was made. And I admit that the words, "*other due course of law*," qualify the clause that would seem to exclude trials upon coroners' inquisitions.

The case in 1 *Dallas*, *Respublica* vs. *Oswald*, mentioned by his honour the mayor, was not a decision *in the last resort*, nor was it upon this question. It was not a question upon the constitution of the United States; but whether the bill of rights of that commonwealth did not preclude the trial of a prisoner on the finding of a coroner; if so, there is no American decision upon the point.

I shall now retrace the outlines of my argument. By the United States' constitution, the party can be tried only upon the indictment of a grand jury, and not by any other mode, as by information or inquisition of office. And this law is universal and paramount. When that constitution says, "there shall be no *ex post facto* laws; or, that persons shall not be twice tried or put in jeopardy for the same offence," may not that benefit be claimed by virtue of that constitution, at the hands of every tribunal within the range of the United States? This is the universal law; and

courts will not be forward to beat down the protecting shield of all the citizens of every state, by doubtful exceptions.

It was said, that the ordinary rule is, not to bail for felony; and, that it would be nugatory, since we did not ask to be discharged from the *inquisition*, but simply to be bailed on the *indictment* which is before this court. Thus, putting the case upon its true footing, renders an answer unnecessary to many of the points urged on behalf of the prosecution. Nor will I inquire whether the lesser offence be merged in the greater. The counsel was, in that point, deceived by his authority; his conclusions were, as they always are, just; but, fortunately for the prisoner, his premises were false.

The court took time to consider.

OPINION OF THE COURT.

19*th February*, 1820.

PRESENT AS BEFORE.

His Honour the Mayor this day delivered the opinion of the Court.

The people of the State of New-York vs. *Robert M. Goodwin.* } On application to bail.

On the 7th of January last, the grand jury of this court presented an indictment of Manslaughter, against Robert M. Goodwin, the prisoner at the bar, accusing him with having feloniously killed James Stoughton. The next day the prisoner was arraigned on that indictment, pleaded not guilty, and on being asked if he was ready for his trial, he answered he was not. An application was then made to bail the prisoner. The court intimated their opinion, that it was not of course to bail on such a charge, and the matter was no further moved at that term.

At an early day in this term, the counsel for the prisoner moved that his trial should be brought on in the course of the term, or that he should be discharged; and if not discharged, that he should at least be bailed.

On that occasion, the public prosecutor stated, that an inquest had been found against the prisoner for the murder of James Stoughton; the person who by the indictment for manslaughter he is accused of having feloniously killed. That the inquest had been by the coroner put on the files of this court, and that it was intended to try him on that inquest at a Court of Oyer and Terminer, which would be held in this city for the purpose, as soon as the duties of the judges of the Supreme Court as members of the Court of Errors, and of the Council of Revision, now in session at Albany, would permit one of them to preside at an Oyer and Terminer here. That on this account he avowed that it was not his intention to try the prisoner in this Court, nor would he consent to his being bailed or discharged. The court declined grant-

ing the application at that time, but consented, at the request of the counsel, to hear the application anew. And now on the last day of the next term after his indictment, the prisoner applies to be bailed on the charge of manslaughter.

A court constituted as this is, ought, in my opinion, cautiously to refrain from deciding any point of law in which their decision is not absolutely necessary to dispose of the case immediately before them. We may, I think, give our judgment on the present application, without giving any opinion as to many of the important points raised on the learned and able arguments that have been submitted to the court.

I shall, in the first instance, consider this subject as if it were to be decided on the supposition that the prisoner stood before this court indicted for manslaughter only; and shall therefore for the present put out of view every other circumstance. The question then is, whether the court ought in this indictment for manslaughter, as a matter of course, merely on the prisoner's application, to admit him to bail.

The power of the court to bail for this offence under any circumstances, has been questioned by the counsel for the prosecution. But it seems to me that the power to bail must be incident to the power to hear and determine. We have certainly power to discharge altogether. It is expressly given to us by statute under certain circumstances, and without statute, it necessarily belongs, as it appears to me, to a court having the power to try as in all cases to which such power extends. If we have the power to grant a gratuitous discharge, it must follow, I think, that we have power to discharge *sub modo*. If we may discharge without bail, *a fortiori* we may discharge upon bail. The case from *Salkeld*, which upon its being first read, I did consider in opposition to this position, I think has been satisfactorily met by the observations of the defendant's counsel, and has been shown to be reconcilable with what I understand to be the law. (*Lord Mohun's case*, *Salk.* 104.)

But I should wish to give this point a more deliberate examination before I venture to give a decisive opinion upon it. I do not mean to give such an opinion at this time, because I believe it is not necessary that I should; for the present question does not in my mind turn upon the power of the court. It is enough to consider whether, supposing the court has a discretionary power to bail, they ought now to exercise that power.

It seems to be admitted that where a person is charged with any felony above the degree of petit larceny, (as to which there is a statutory provision) he cannot demand bail as of course, and that the court or magistrates, having the power, are to bail him or not at their discretion.

Legal discretion never means, either in criminal or civil law, arbitrary will.

Legal discretion is always to be governed or directed by known and established rules, and in truth cannot be otherwise applied than to decide whether facts bring the case within the operation of such rules.

The well established rule of law applicable in this case is, that a person fully and explicitly charged with a felony cannot be bailed, unless there be something presented in opposition to the charge which may raise a presumption in favour of his innocence; or at least it must appear indifferent to the court or magistrate called on to bail him, whether he be guilty or not.

It is unnecessary to recapitulate the authorities which have been cited to this effect. It has been the law of England and of this country since the time of the statutes of Edward the first. No case has been cited to the contrary. And I never knew of any practice of this court, or any other, that violated a rule, the strict observance of which appears to me to be absolutely necessary to a due and impartial administration of law; of that administration which shall put the poor and the rich on an equal footing in a court of justice.

This rule is not disputed by the counsel for the prisoner: they contend, however, that the maxim of law that every man is to be presumed innocent till he be found guilty, applies to this case at this time. But it is obvious that this argument would lead us too far—for if it would now apply it would at all times reach every case. And if it is always to be adopted, then it would follow that in every case the accused must be let to bail. The truth is, that this just and benign principle is not applicable, except when the accused is on his trial: for the purposes of securing his person to answer to a direct and positive charge, made in due form, and to bring him to that trial, we are bound to treat him as if he were guilty: at least we must do so until some matter be presented in his favour, which in the exercise of our discretion we shall judge a presumption of his innocence.

In this case nothing of that nature is offered. The prisoner is not only committed on a charge of felony fully and explicitly expressed in the warrant of commitment, but he stands charged with a felony of manslaughter, by the indictment on the files of this court.

It appears to me in vain to say that the public prosecutor is to produce further evidence of the guilt of the accused, than the commitment or indictment, since the law says that he must raise a presumption in favour of his own innocence. It can only mean that he must destroy the presumptions which must necessarily arise against him from these accusatory documents.

In some instances indeed the magistrate or court may look into the testimony on which the accusation is founded; and if it affords the presumption in favour of the prisoner's innocence, he may be bailed.

A second ground however of this application is, that the trial of the prisoner on the indictment for manslaughter has been so long delayed that he is entitled to be bailed, if not discharged.

I have no doubt if there be any unreasonable delay in the prosecution of an indictment which this court may try, it ought to im-

terpose its authority and relieve the accused from the oppression of an unnecessary and unwarranted imprisonment.

We are then to inquire whether there has been such delay in this case.

As I have already stated, the prisoner was indicted and arraigned the last term, that he then said he was not ready for trial, and at this second term his counsel have moved for his trial, which the public prosecutor has avowed he did not mean to bring on.

A statute of this state provides, that if any person indicted shall not be brought to trial at the second term of the sessions after the commitment, he shall be discharged as far as relates to any treason or felony for which he was committed, unless a satisfactory cause be shown by the public prosecutor for not bringing him to trial.

The application to the court is not to discharge the prisoner, but to bail him. If the court thought him entitled to his discharge, they could not refuse to admit him to bail.

Under the provision of this statute, the prisoner would be entitled to his discharge unless the public prosecutor has shown satisfactory cause for not bringing him to trial.

The only cause he has shown is, that by a coroner's inquest the prisoner is charged with murder: and the public prosecutor avows his intention to arraign the prisoner on that inquest in the Oyer and Terminer, where by law it is returnable; and which court has solely jurisdiction of the crime which it charges.

We have then to decide whether this court ought to consider the existence of the inquest as satisfactory cause for not now putting the prisoner on his trial.

This inquisition I have no doubt is improperly on the files of this court. It ought to be in the hands of the coroner until returned pursuant to the statute, to the court of Oyer and Terminer. Yet I think this court is bound to take notice of it. We may consider it as presented to us by the public prosecutor in the hands of the coroner; or it appears to me we are bound to receive the representation of the public prosecutor of the existence of the inquisition, and of his intention to proceed upon it. Circumstances may exist when we should be obliged to accept this evidence of a no less solemn and important fact, as to which I do not know how otherwise we could obtain information. Suppose that the prisoner instead of being now charged by a coroner's inquest with murder, had at the last Oyer and Terminer been indicted for that crime; and that the last grand jury of this court had notwithstanding presented the indictment for manslaughter now on our files: how could we have obtained knowledge of the proceeding in the Oyer and Terminer, but by the information of the public prosecutor? At any rate I think this inquisition is so before us as that we are bound to take it into our consideration.

Supposing for a moment, that this inquisition is equivalent to an indictment, and that the prisoner may be arraigned and convicted upon it in the Oyer and Terminer; then can this court, consistent with its duty, take any step, or pursue any course which might in-

terfere with that jurisdiction which the laws of our country have committed to a higher tribunal? We have no cognizance of the crime of murder. Shall we then adopt measures which will arrogate to ourselves the disposition of an accusation on which it belongs to our superiors to decide? If we were to try the prisoner on the indictment for manslaughter, unquestionably we should put an end to the prosecution for murder—and is there not a great inconsistency in saying that this inferior tribunal can or ought to pursue such a course as to take to itself the decision of a matter which does not belong to it, but which, by the constitution and laws of our country, is delegated to a superior court? If the inquisition be equivalent to an indictment, then, in virtue of the inquisition, the case of the prisoner is as much attached to the Oyer and Terminer as if there was an indictment of that court to the same effect. Suppose, then, that after an indictment in the Oyer and Terminer, a grand jury in this court were to find a bill on the same facts for murder; it seems to me, that every one will admit that it would be absurd to say, that because the session grand jury had chosen to find a bill for manslaughter, that we could and ought to proceed on that bill, and thereby oust the Oyer and Terminer of the trial and decision of the cause. If this doctrine were to prevail, it would utterly confound all jurisdictions. I cannot see why the indictment for manslaughter should be allowed to interfere with the inquest for murder, more than if a grand jury, after having found an indictment for larceny in this court, should afterwards find an indictment for trespass on the same facts, the latter should be allowed to interfere with the former.

It is admitted, that in England, the inquest is equivalent to an indictment; but it is said, that we ought not to consider it so, because by the constitution of the United States, no man can be held to answer upon it. This is a question I do not mean to take upon me to decide. The law of our state, which has been revised several times since the adoption of the constitution, not only points it out as a mode of prosecution, but provides that the justices of Oyer and Terminer shall *proceed thereon*: and it is admitted that in several, at least in more than one instance in this state, persons have been put to answer on coroners' inquests. Would it not then be a most unwarrantable presumption in this court to act on their own opinion, when that opinion was in opposition to repeated legislative acts, and to the decisions of tribunals to which we are unquestionably subordinate? We have been asked if the document now presented to us, and which purports to be an inquest of the coroner, were manifestly defective; as for instance, if it should appear to have been the finding of only eleven jurors, if it should want seals or the name of the coroner, yet would we then suffer it to controul us in the administration of justice? I answer, certainly not. For then it would be no inquest. It would be only requiring us to open our eyes to see that it was not; and in determining to disregard it, we should not be exercising the highest judicial function, and in opposition to the legislature, and superior courts, deciding a great

constitutional question which, in my mind, belongs to another tribunal.

I am therefore of opinion, that when the public prosecutor showed us the coroner's inquest, accusing the prisoner of the murder of the same person whom he is charged by the indictment on our files with feloniously killing, he has shown sufficient cause for not bringing the prisoner to trial, and that we ought not, whatever our power may be, as to the manslaughter, at this time, either to bail or discharge him.

I beg it to be observed that my opinion is, that we ought *now, at this time*, to receive the inquest as a satisfactory cause, shown by the public prosecutor, for the delay which has taken place. I by no means intended to say that it should always be so considered. I think this court, nor no other court, should leave the prisoner at the mercy of the public prosecutor. We never will suffer the duration of his imprisonment to depend on the pleasure of the attorney for the people. Our laws have taken good care to guard against oppression by their administrators, and it is our duty to see that their provisions in favour of humanity, and the liberty of the citizens, are duly enforced. If, therefore, it should appear to us that there is any wanton, or even unnecessary delay on the part of the public officer; if, after there has been an Oyer and Terminer in this county, no measures should be taken on the inquisition, or if the prisoner could justly complain of delay in the appointment of such a court, then I think an application like the present would call upon us to decide as to the extent of our powers, and whether we would not exert them for the relief of the prisoner. The opinion now delivered, goes no farther than to decide that if we may, at our discretion, bail the prisoner on an indictment for manslaughter, we do not think it would be a proper exercise of that discretion, to bail him under existing circumstances. The application is therefore refused.

The mayor then stated that the opinion just delivered, must be no farther considered as the opinion of the court, than as it expressed a determination not to admit the prisoner to bail at present.

TRIAL, &c.

At a Court of General Sessions of the Peace, holden in and for the City and County of New-York, at the City Hall of the said City, on Tuesday the 14th day of March, in the year of our Lord 1820:

PRESENT,

The Honourable CADWALLADER D. COLDEN, *Mayor of the City of New-York;* GEORGE B. THORP, Esquire, STEPHEN ALLEN, Esquire, *Aldermen of the said city;* — *Justices of the Sessions.*

JOHN W. WYMAN, Esq. Clerk.

The People of the State of New-York vs. *Robert M. Goodwin.* — On Trial, on an Indictment for Manslaughter, in killing James Stoughton, Esquire, found on the 8th January last.

Counsel for the people.

Messrs. Van Wyck, Blake, Griffin, and Wells.

Counsel for the prisoner.

Messrs. Hoffman, Emmet, D. B. Ogden, S. Price, Munro, and J. A. Hamilton.

At a quarter before twelve, the court was opened, with the usual proclamation, and the district attorney had leave to proceed with the trial of this cause.

Clerk. Sheriff of the city and county of New-York, put Robert M. Goodwin to the bar.

James L. Bell, esquire, the sheriff, then put the prisoner to the bar; his brother, capt. Ridgely, and Samuel Corp, esq. a friend of his, sitting below and in front of him.

Crier. Hear ye, hear ye, hear ye! You good men who are returned as petit jurors at this Court of General Sessions of the Peace, now held in and for the city and county of New-York, answer to your names, every one at the first call, and save your fines.

The Clerk then called over the panel of jurors, and all appeared except one, on whom the court imposed a fine of $25.

Clerk. Robert M. Goodwin, prisoner at the bar, those good men, whose names you have just heard called, and who now appear,

are those who are to pass between you and your country on your trial. If therefore you will challenge them, or any of them, your time to challenge them will be as they come to the book to be sworn, and before they are sworn, and then you will be heard.

The Clerk then proceeded to ballot for the jury, and the name of Charles Swan was drawn from the box before it was discovered, and observed by Mr. Wyman, that proclamation for the *trial* had not been made. And the question arose whether the ballot of Mr. Swan could be returned to the box again.

Emmet. I humbly conceive, if the court please, that when a juror's name is drawn from the box, the ballot cannot be returned.

The Mayor. I believe you are correct.

Van Wyck. We consent that Mr. Swan be sworn one of the jurors.

The Mayor. Proceed, Mr. Clerk.

Clerk. Crier, make proclamation.

Crier. Hear ye, hear ye, hear ye! You good men who are returned to inquire between the People of the State of New-York, and Robert M. Goodwin, the prisoner at the bar, answer to your names, every one at the first call, and save your fines.

Van Wyck suggested, as this had been a case already so much agitated, and likely to be so throughout, whether it would not be well to agree that the jurors should be asked, each as he came severally to the book, whether he had formed any opinion upon the merits of the case.

S. Price said it was no less the wish of the counsel for the prisoner.

The Mayor. There is a preliminary question of practice, upon which I should like to hear the counsel, unless they can agree upon it. The English law and ours differ upon this subject. This is, I think, a principal challenge for cause, and the juror is called and asked whether he has formed an opinion. If it be indeed a principal challenge for cause, it is to be tried and decided by the court. It may be asked, whether a juror ought to be allowed to get rid of his duty in such a grave and delicate case by merely answering in the affirmative. I find this practice unsettled. In the case of Col. Burr, the jury were asked this question, but not upon oath. In the case of Fry, it was not upon oath. In the case of Selfridge, it was upon oath. It is a sort of trial then upon testimony. If, however, it be a challenge for favour, how is it to be examined upon oath? The practice now to settle is, whether, considering it a challenge for favour, the juror is or is not to be put to answer upon his oath.

Emmet. It would be our wish that every juror should be examined upon oath. If we have any objection, it is this: that we might choose to try the question by testimony; the import of that testimony would be, as to the competency of the juror, the same as his own oath: and it is proper that it should be put under oath, to prevent his evading, and giving, perhaps, such an answer as he would not give under that solemnity. Might we not make it a general rule, that each juror might be asked upon his oath, unless

where the counsel on either side should say, that they wished to examine witnesses.

The Mayor. This is, I think, a challenge *propter affectum.* If so, let us first see whether it is proper to put any question to the juror upon oath.

Emmet. It appears to me, that in those cases where the oath has been dispensed with, it has rather been a matter of accommodation than of strict practice; and, I think, so important a fact as the prepossession of a juror's mind, ought not to be decided but upon the oath of somebody.

The Mayor. Let the juror then, be examined upon his oath.

It now became a question what the form of that oath should be, and the mayor proposed this form:

"You do swear that you will make true answer to such questions as shall be put to you, touching your competency as an impartial juror, between the People of the state of New-York and Robert M. Goodwin, the prisoner at the bar"—so help you God.

Van Wyck. I only require the general question, and have nothing to do with consent. But the court has decided it, and it is my duty to submit.

The Mayor then, at the desire of the prisoner's counsel, asked the juror if he had formed an opinion, &c.

Juror. I have formed an opinion, but from rumour merely.

Griffin. How far can that circumstance create incompetency in the juror?

The Mayor. This is the very objection taken in the case of *Fry;* a new trial was there granted, because one of the jurors had said that the prisoner ought to be hanged. And, it seems to me, it is all one from what cause he has made up his mind. The true question is, is he an impartial juror? and I do not think he is. And after consulting with the aldermen, his honour the mayor stated it to be the opinion of the court that he was incompetent. And he was set aside.

Then *James Glass* was put to the book, and asked by the mayor, "Have you formed an opinion of the guilt or innocence of this prisoner?"

Juror. I have formed none. I never saw either of the gentlemen, nor have any knowledge whatsoever of their affair.

The Mayor. It is enough, sir; you need not go further than the simple answer to the question.

Mr. Glass was then sworn.

Garrit Van Cleef was next called.

S. Price. In this instance, we will dispense with the oath; but if the juror chooses to be on the jury, we will formally challenge him, and endeavour to prove his expressions.

Van Wyck. I must consider him a competent juror, knowing nothing to the contrary. The gentlemen must take the one or the other mode of proceeding.

The Mayor. The matter may be tried either way; for the juror is called by neither party.

Van Wyck. I cannot agree to that. The juror comes here to try the cause, by compulsion of the process of the law; and he ought not to be put to the exposure of having witnesses called from every quarter to prove his partiality, after he has sworn that he was unbiassed; he being totally unprepared to vindicate his own veracity by any further proof, such pretence would be enough to make any juror shrink from appearing in a court.

Price. The rule adopted in the case of *Thorn*, was to permit the question to be asked, and then the fact to be afterwards fully tried.

Hoffman. We do not wish to be precluded from testimony, and if asking the juror was to preclude us, we would not have the question asked. If he should admit, however, that he had formed an opinion, it would save the time of the court; but if he deny it, the triers appointed may afterwards try it. I apprehend, the juror, if the question was put, would admit that he had used very strong expressions of a formed opinion.

Wells. In the case of witnesses upon their *voire dire*, if you once ask the witness, you cannot afterwards contradict him. Yet here, after the juror has said that he has no opinion formed, nor made any declarations, the gentlemen would call perhaps witnesses to confront him. I think they must take the answer, since they ask the question, and not involve the juror as a party in such a controversy.

Hoffman. We all know, that in such a case as this, it is almost impossible to have an indifferent jury. In *Smith and Ogden*, a juror was put upon his oath, touching his expressions in a tavern; two other witnesses were called, (Mr. Ludlow I remember was one) and their testimony was submitted to the triers. The objection is but visionary: we are not to inquire into the veracity of jurors, but whether they are competent. Would the court ever preclude testimony to prevent a partial juror from sitting on the trial of a prisoner? A juror may have an inclination to acquit from favour; he may have a corrupt desire to convict from prejudice or malice. Why then introduce the technical rules respecting witnesses, which cannot go to the true merits of the question? The court, if witnesses should appear to contradict the assertion of the juror, may put all necessary questions to ascertain the truth.

The Mayor. It is incumbent upon the court, in every case of doubt, not to decide against the prisoner. The objection is, that the juror comes not as a party to a suit, and that his character might be affected by involving him in a controversy for which he was unprepared; but a juror is not supposed more indifferent to the parties, than a witness is supposed to be; yet there is no objection to the contradiction of a witness by evidence. A juror is not called by either party, nor the question put by either party, but rather by the court, for the fair administration of justice. As I have not had time to examine this question, and as I have doubts, I would take the safer course, and decide for the prisoner. And—

On consulting with the Aldermen, the Mayor declared this to be the opinion of the majority of the court.

Price then asked the juror if he had expressed any opinion.

Wells prayed that the court might itself conduct the inquiry.

The Mayor. Have you any opinion at this moment as to the guilt or innocence of the prisoner?

Juror. I have not. I cannot say any thing about it till I hear his witnesses.

Mayor. Have you any bias or prejudice for or against him?

The juror answered that he had none, and was thereupon sworn.

The next called was *John Stewart, jun.* who was in like manner sworn to make true answer.

The Mayor. Have you made up any opinion in this case?

Juror. I have, sir. I was near where the affray happened, and heard all the evidence from one of the coroner's jury; and think myself incompetent to be a juror on the trial of the prisoner.

He was set aside.

Mr. Judah now appeared, who had been excused from indisposition, and was absent when called, and was challenged by Mr. Price.

Van Wyck. Let the gentlemen state the cause of their challenge.

Price. Have I not the right to ask him now whether he has made up an opinion?

Wells. This juror has been now regularly challenged, and the counsel must proceed regularly.

The Mayor. These are all, I take it, principal challenges to the favour.

Van Wyck. Challenges to the favour, as for relationship or any such cause, are principal challenges, and ought to be distinctly stated, that they may be denied or demurred to. The counsel should state his cause of challenge.

Price. We challenge this juror upon the ground of having expressed an opinion.

The Mayor. That is a proper challenge, and the question is to be put to him by the court, upon oath.

The juror was sworn upon his *voire dire*, and the mayor asked him if he had formed any opinion.

The Juror. From conversation with some of the grand jury after they broke up, I was led to form an unfavourable opinion.

[Quere, whether this witness might not have meant the coroner's jury, grand jurors being sworn to keep their counsel and that of their brethren!]

The proceedings were suspended for a short interval by the coming of the grand jury into court. When they retired, *Mr. Van Wyck* observed that he would henceforth leave the gentlemen on the other side to challenge as they chose, and should take no farther exceptions.

John H. Hieman was then sworn on the *voire dire*, and the mayor put the same question to him, viz. whether he had formed any opinion on the merits of the question, or the guilt or innocence of the prisoner. The juror answering in the negative, was sworn in chief as a juror.

Israel Horsefield was sworn on the *voire dire*, and the same question put to him by the mayor.

Juror. According to the out-door rumours, my opinion was unfavourable to the prisoner, but I have formed no fixed opinion.

Emmet prayed that the question might hereafter be asked in the words used in *Selfridge's* trial: "Have you made up your minds?" (See the trial, p. 9.)

It was then agreed that the clerk take the book and ask the two following questions as there propounded:

1st. "*Have you heard any thing of this case, so as to have made up your mind?*"

2d. "*Do you feel any bias or prejudice for or against the prisoner at the bar?*"

The juror answered that he had heard nothing but the out-door rumours, and felt no bias for or against the prisoner. (Sworn of the jury.)

Charles Gordon sworn on his *voire dire* to make true answer, &c. to the same questions, returned the like answers, that he had formed no opinion and felt no bias; and was sworn of the jury.

Joseph M. Clark, *James Hallet*, *Jason M. Bass*, and *Peter Crawbuck*, were in like manner sworn to make true answers, and to the same questions returned like answers, and were in like manner sworn of the jury.

James Segoine sworn on his *voire dire*, and questioned, said he had certainly *given* his opinion.

The Mayor. This comes within the rule laid down. He has given, and therefore made up his opinion. He was set aside.

John Thompson on his *voire dire*, answered both questions in the negative, and was sworn of the jury.

John Redman was in like manner examined, and on like answers, sworn of the jury.

Price now observed to the court, that if the same questions had been put to Mr. Seaman, and another gentleman first sworn, they would have answered as those did that had been set aside.

The Mayor. We cannot try those challenges over again, that is most certain. This rule by which we have been proceeding, was laid down at the suggestion of the prisoner's counsel.

John Redman and *John Vanderpool* were both sworn and examined on their *voire dire*, and answering distinctly in the negative to both questions, were sworn of the jury. And now there was a full jury sworn, and the following composed their panel:

Clerk. Gentlemen of the jury, answer to your names as they are called. Crier, count them.

James Glass,	*Charles Gordon*,
Garrit Van Cleef,	*Joseph M. Clark*,
James Hallet,	*Peter Crawbuck*,
Jason M. Bass,	*John Thompson*,
John H. Seaman,	*John Redman*,
Israel Horsefield,	*John Vanderpool*.

The jurors all answering to their names, and being duly empanelled, the mayor informed those of the general panel that they were discharged; and stated to the gentlemen just now sworn in, that the court had heard of a great number of witnesses, 40, 50, or perhaps 60, that might be examined; that it was impossible to suppose they could all be examined, and the trial concluded in the course of one day, and that there was reason to apprehend that several days would be consumed in the proceedings: that the jurors, therefore, might take the opportunity of informing their families of this circumstance, by means of the others of the panel, who were permitted to go home.

The jurors then asked permission to go down stairs for a short time, which was consented to on both sides, two officers being sworn to attend them; and on their return into court, their names were again called over, and all again answered to their names.

Clerk. Robert M. Goodwin, prisoner at the bar, hold up your right hand. Take it down. Gentlemen of the jury, look upon the prisoner and hearken to his charge. He stands indicted as follows:

The clerk then read the following

INDICTMENT.

City and County of New-York, ss.

The Jurors of the people of the state of New-York, in and for the body of the city and county of New-York, upon their oath, *Present:* That Robert M. Goodwin, late of the first ward of the city of New-York, in the county of New-York, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the twenty-first day of December, in the year of our Lord one thousand eight hundred and nineteen, with force and arms, at the ward, city and county aforesaid, in and upon one James Stoughton, in the peace of God and of the said people then and there being, feloniously and in the fury of his mind did make an assault: and that the said Robert M. Goodwin, *with a certain drawn sword made of iron and steel*, and of the value of one dollar, which he, the said Robert M. Goodwin, in his right hand then and there had and held, him, the said James Stoughton, in and upon the left side, near the ninth rib, of him, the said James Stoughton, then and there feloniously, and of the fury of his mind, did strike, thrust, stab, and penetrate, giving unto the said James Stoughton, then and there, with the drawn sword aforesaid, in and upon the left side of him, the said James Stoughton, near the ninth rib of him, the said James Stoughton, one mortal wound of the breadth of one inch and of the depth of eight inches, of which said mortal wound he, the said James Stoughton, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say: That the said Robert M. Goodwin, him, the said James Stoughton, in manner and by the means aforesaid, feloniously, and in the fury of his mind, did, then and there, kill and slay, against the peace of the people of the state of New-York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do farther present: That the said Robert M. Goodwin, afterwards, to wit, on the same day and year aforesaid, at the city and county of New-York aforesaid, and at the ward aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, with force and arms, in and upon the said James Stoughton, in the peace of God and the said people then and there being, feloniously, and in the fury of his mind, did make an assault; and that the said Robert M. Goodwin, *with a certain drawn dagger made of iron and steel*, of the value of one dollar, which he, the said Robert M. Goodwin, in his right hand then and there had and held, him, the said James Stoughton, in and upon the left side, near the ninth rib of him, the said James Stoughton, then and there feloniously, and of the fury of his mind, did strike, thrust, stab, and penetrate, giving unto the said James Stoughton then and there, with the drawn dagger aforesaid, in and upon the left side of him, the said James Stoughton, near the ninth rib of him, the said James Stoughton, one mortal wound, of the breadth of one inch, and of the depth of eight inches; of which said mortal wound he, the said James Stoughton, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Robert M. Goodwin, him, the said James Stoughton, in manner, and by the means last aforesaid, feloniously, and in the fury of his mind, did kill and slay, against the peace of the people of the state of New-York and their dignity.

And the jurors aforesaid, upon their oaths aforesaid, do further present: That the said Robert M. Goodwin, afterwards, to wit, on the said twenty-first day of December, in the year of our Lord one thousand eight hundred and nineteen, at the city and county of New-York aforesaid, and at the ward aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, with force and arms, in and upon the said James Stoughton, in the peace of God and of the said people then and there being, feloniously, and in the fury of his mind, did make an assault. And that the said Robert M. Goodwin, *with a certain weapon, the blade of which was made of iron and steel, and commonly called a swordcane*, and of the value of one dollar, which he, the said Robert M. Goodwin, in his right hand then and there had and held, him the said James Stoughton, in and upon the left side, near the ninth rib of him, the said James Stoughton, then and there feloniously, and of the fury of his mind, did strike, thrust, stab, and penetrate; giving unto the said James Stoughton, then and there, with the said last-mentioned weapon aforesaid, in and upon the left side of him, the said James Stoughton, near the ninth rib of him, the said James Stoughton, one mortal wound of the breadth of one inch, and of the depth of eight inches, of which said mortal wound he, the said James Stoughton, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say: That the said Robert M. Goodwin, him, the said James Stoughton, in manner and by the means last aforesaid, feloniously, and in the fury of his

mind, did kill and slay, against the peace of the people of the state of New-York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Robert M. Goodwin, afterwards, to wit, on the said twenty-first day of December, in the year of our Lord one thousand eight hundred and nineteen, at the city and county of New-York aforesaid, and at the ward aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, with force and arms, in and upon the said James Stoughton, in the peace of God and of the said people then and there being, feloniously, and in the fury of his mind, did make an assault. And that the said Robert M. Goodwin, *with a certain drawn sword, being part of a swordcane, and made of iron and steel*, and of the value of one dollar, which he the said Robert M. Goodwin in his right hand then and there had and held, him, the said James Stoughton, in and upon the left side, near the ninth rib of him, the said James Stoughton, then and there, feloniously, and of the fury of his mind, did strike, thrust, stab, and penetrate; giving unto the said James Stoughton, then and there, with the said last-mentioned weapon aforesaid, in and upon the left side of him, the said James Stoughton, near the ninth rib of him the said James Stoughton, one mortal wound of the breadth of one inch, and of the depth of eight inches; of which said mortal wound he, the said James Stoughton, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say: That the said Robert M. Goodwin, him, the said James Stoughton, in manner and by the means last aforesaid, feloniously, and in the fury of his mind, did then and there kill and slay, against the peace of the people of the state of New-York and their dignity.

The clerk then said to the jury: "Upon this indictment, gentlemen, the prisoner has been arraigned; upon his arraignment he pleaded not guilty; and for trial, puts himself on the country, which country you are. Your charge therefore will be, to inquire whether he is *guilty* of the felony charged in this indictment, or *not guilty;* and if you shall find him guilty, you are to say so. If you find him not guilty, you are to say so, and no more. Therefore, gentlemen, sit together and hear your evidence."

Van Wyck, District Attorney. May it please the court and gentlemen of the jury. The reading of the indictment has apprised you of the nature of the offence charged against the prisoner. The occurrence which has led to this result, was one which naturally excited a great sensation in this city, and the sensibility displayed we may take as a symptom of honourable feeling among our citizens. The security of life is the most important benefit that civilization confers. It is the keystone of all other security: and when any community, from the tyranny of its government, the want of government, or the depravity of its citizens, is arrived at that stage that men cannot walk abroad in open day without danger of assassination, its condition is hopeless.

It becomes my duty to state to you, gentlemen, what will be the

evidence in support of the indictment which has been read to you. The occurrence took place shortly before the new year, in one of the most frequented parts of our city, about the hour of three o'clock, in open day, between two gentlemen well known to each other. It will appear that the provocation was given by the defendant. Some former disagreement had existed between them; and as they approached each other the defendant presented his cane towards the deceased, and said, there goes a coward and a scoundrel. They were going in different directions. The deceased turned round and asked the prisoner if he would repeat those words. Something was said by the prisoner, and the deceased, it seems, gave him a blow, and a conflict thereupon ensued. The prisoner laid hold of the deceased and struck him with a sword-cane, the sheath flew off, and in the course of the conflict Mr. Stoughton was stabbed with the dagger, never spoke afterwards, and very shortly died. A coroner's inquest was held upon the body and returned a verdict of murder. I state that fact without meaning that it should have any influence for or against the prisoner. It is thought to be the opinion of men more learned in the law than we are, that it would be an improper practice to try a man upon a coroner's inquest, when a grand jury had found an indictment for the same matter. And they have doubts also whether it would not be reviving an obsolete proceeding. An article too in the constitution of the United States, has been referred to, which has been thought by some to warrant that position. The course therefore adopted, has been, to try the prisoner upon this indictment, touching which, there can be no doubt. You are to try him now for the crime of manslaughter. And in all such cases, the killing being once established, the question arises, whether it was a felonious homicide, amounting to manslaughter, or otherwise excusable or justifiable. It will appear that the deceased was killed in a sudden affray. A sudden quarrel arose between the parties, and though there may have been indecent language or insulting gestures, that is not the point on which the case can turn. The true and only considerations are these two: first, whether Mr. Stoughton was killed by the defendant, and second, whether the defendant can show any justification or excuse; for if he cannot, he will be guilty of manslaughter at the least. And though it should be thought to amount to a higher crime than manslaughter, that can alter nothing in your verdict, since if it amount to murder it certainly amounts to manslaughter. I mention this, gentlemen, to obviate certain erroneous opinions, that if a man has committed murder, he is not to be found guilty of manslaughter. And though I propose to be very brief, gentlemen, in this opening of the testimony, which you will hear in detail from the mouths of the witnesses, yet I think a little time would not be ill spent in reading some of the law upon this subject.

The counsel then read from 1 *East's Cr. L. p.* 232, 619, "Of homicide from transport or passion in heat of blood," as follows: "Herein is to be considered under what circumstances it may be presumed the act done, though unintentional of death, or great bodily harm, was not the result of a cool deliberate judgment, and

previous malignity of heart, but imputable to human frailty alone." "Upon this head it is principally to be observed, that whenever death ensues from a sudden transport of passion, or heat of blood, if upon a reasonable provocation, or without malice, or if upon sudden combat, it will be manslaughter; If without such provocation, or the blood has had reasonable time or opportunity to cool, or there be evidence of express malice, it will be murder. For let it be again observed, that in no case can the party killing alleviate his case, by referring to a previous provocation, if it appear by any means that he acted upon express malice; it becomes then material to consider what is a sufficient provocation. Words of reproach, how grievous soever, are not sufficient to free the party killing from the guilt of murder; nor are contemptuous nor insulting gestures, without any assault upon the person."

The distinction is, gentlemen, that if the killing take place upon mere words, it is always murder; if upon the provocation of a blow, it may be reduced to manslaughter. But if he had given the other a box on the ear, or had struck him with a stick, or other weapon *not likely to kill*, and had unluckily, and against his will, killed him, it had been but manslaughter; for no malignant intention can be collected from such acts.

But if any assault made with violence, or circumstances of indignity, upon a man's person, as by pulling him by the nose, be resented immediately by the death of the aggressor, and it appeared that the party acted immediately without heat of blood, upon that provocation, it will reduce the crime to manslaughter. So my *Lord Hale* says it would be, if A. riding upon the road, B. had whipped his horse out of the track, and then A. had alighted and killed B.

Mr. Van Wyck then passed on to page 238 of the same author, § 23, and read these words: "In all the instances above enumerated, the party killing is supposed to have taken all advantages in the heat of blood over the person slain; but to have received such provocation as the law presumes might, in human frailty, heat the blood to a proportionable degree of resentment, and keep it boiling to the moment of the fact; so that the party may be considered as acting under a temporary suspension of reason, and not from any deliberate malicious motion. And it has been shown, that in the case of a legal provocation, strictly so considered, this heat will extenuate the guilt of the parties acting under its adequate influence, even though he made use of a deadly weapon." And in page 239, § 23, this author continues: "In no case, however, will the plea of provocation avail the party if it were sought for and induced by his own act, in order to afford him a pretence for wreaking his malice, as where A. and B. having fallen out, A. says he will not strike, but will give B. a pot of ale to touch him, on which A. strikes, and B. kills him, this is murder."

I shall now, gentlemen of the jury, state in few words by way of anticipation, what may possibly be set up as a defence. It will, perhaps, be said that this act was done in self-defence; but the law is, that any person who sets up a plea of self-defence, must show that he was so pressed as to be in danger of great bodily

harm, for, if there were not just cause for such fear, he ought to retreat, and I apprehend this case will not amount to that.

It may be further pretended, that in this sudden conflict, the wound was given by accident, without any volition or purposed act on the part of the defendant. I can only say, from the testimony of those who saw and examined the wound, that it appeared to have been no less skilful than atrocious, and that it could not be given without human aid. That the deadly weapon with which it was inflicted, could not have penetrated the body as it did, nor have been again withdrawn, but by a human hand; and if it was given by the hand of the prisoner, it will be irresistibly conclusive that he is guilty of the crime at the very least of which he now stands charged.

Here one of the jurors (Mr. Crawbuck) requested to have permission to speak with his son, whom he perceived to be in court, which, upon all the counsel consenting, was allowed.

First Witness for the Prosecution—Benjamin Clark.

Was affirmed, and then examined by *Van Wyck, District Attorney.* Being desired to state what he saw and knew of the manner in which Mr. James Stoughton came by his death, he gave his evidence as follows:

On the 21st of 12th month (December) last, I saw the prisoner and James Stoughton approaching each other in a hostile attitude, at the southwest corner of Broadway and Courtlandt-street. The prisoner struck Mr. Stoughton with his right hand on the head, and knocked him down. Mr. Stoughton rose immediately, and returned the blow, as it appeared to me, upon the head, or on the face of the prisoner. At that time I interfered, and took Mr. Stoughton by the collar with my left hand, and attempted to take the prisoner at the bar by the collar with my right hand, but missed my hold, and passed my arm across his breast. I looked the prisoner in the face, and exclaimed to this effect: What! gentlemen fighting in the street? He replied, he struck me. I turned to Stoughton, looked him full in the eye, and then first recognized him. His eye had a stern, full look, for perhaps three or four seconds: then he threw up his eyes, fell back, and fainted; and the bystanders broke his fall, and I let go my hold of his shoulder. I then looked at the prisoner, and saw the dagger of a swordcane in his hand. I assisted to carry Mr. Stoughton upon the side walk, to the store next the corner of Courtlandt-street and Broadway, upon the stoop of the store. Some person opened his clothes, his surtout, body coat, and waistcoat; I think his surtout coat was buttoned. It was a blue overcoat, with large capes. I noticed that his countenance was ghastly, and supposed that he was dying. The bystanders took him up, and carried him into the store, and I followed. They laid him on the counter, in the back part of the room—I took hold of his hand and called him by name. I passed along by his side, raised his shirt, perceived a little blood, and then discovered a wound. He appeared to me to be expiring: I left the store, was absent about ten minutes, returned, and found that he was dead.

Van Wyck. When you first saw them, how far off were you?

Wit. As near as I can recollect, I was about fifteen feet from Courtlandt-street, going down, and they were on the other side. It was in Broadway, on the right hand, on the west side, on the flagstones. When I first saw them, they were on the opposite side; when Mr. Stoughton fell, he fell on the round pavement, on the cartway.

Q. Would you know the swordcane again if you saw it?

A. I have no particular mark to know it by. I have a recollection of the appearance of it.

Counsel. State the position of the parties when you first saw them.

Wit. The prisoner was perhaps four or five, or six feet, from the corner of the sidewalk, and nearly, but not directly facing me.

Q. What was Mr. Stoughton's position?

A. Very near the corner of the curbstone. He was upon the sidewalk when he received his deathblow; he fell off quartering with his head from Mr. Goodwin, and his feet towards him; his feet perhaps a foot from the sidewalk.

Q. Did you see the swordcane during the time that they were fighting?

A. I did not see it till he fainted and fell. When he fell, the prisoner and I both stood still in the position we had been in.

Q. Did Mr. Stoughton fall on his back, or on his side?

A. He fell on his back—his breech appeared to take the force of the blow.

Q. Did any one assist him to rise the first time?

A. The first time he rose of himself.

Q. Did he ever speak after that rising?

A. No. I am not sensible that he spoke at all.

Q. How did he look?

A. The look that he gave me was a full intelligent look. It appeared to me that his hip received the force of the shock.

Q. When Mr. Stoughton fainted, did you make any remark to Mr. Goodwin upon the matter?

A. No. No words passed but what I have stated. I said—what! gentlemen fighting in the street? and Mr. Goodwin's reply was—he struck me.

Q. Was any thing said immediately about Mr. Stoughton's being killed?

A. When he fell the second time, a bystander said he had fainted, and some person broke his fall, and let him down upon his seat.

Cross-examined by Hoffman.

Counsel. You were going down Broadway, and the first thing you saw was a blow by Mr. Goodwin, with his right hand, which brought Mr. Stoughton to the ground?

A. It was.

Q. Are you not confident that, at that time, Mr. Goodwin had no cane nor weapon in his right hand?

A. I have no recollection of seeing any thing in his hand.

Q. You say that when Mr. Stoughton fell, you saw Mr. Goodwin

having a sword belonging to a swordcane. Was it not your first intention when you saw Mr. Stoughton fall, immediately to succour him?

A. Yes, immediately. I took no longer time to look round, than the moment when I saw Mr. Goodwin standing with the sword in his hand, and then I turned my eyes again upon Mr. Stoughton.

A. After you had said, What! gentlemen fight in the street?—and then turned your back to Mr. Stoughton—did not you keep him in view till he fainted?

A. I did. I kept sight of his eye till he fainted.

Q. Did you look again at Mr. Goodwin after Mr. Stoughton fell?

A. When he fell, I turned my head again to the prisoner, and saw the dagger in his right hand. This was after he had fainted and fell the second time.

Q. By Van Wyck. Was a considerable crowd there at that time?

A. Yes. I should suppose that in a moment or two there were a hundred persons.

Q. I mean when you first went up to them—were not some gentlemen there?

A. Yes—there were two or three a little below them, on the sidewalk in Broadway.

Q. Did you see Mr. Goodwin go off at that time?

A. As I was following Mr. Stoughton into the store, the prisoner passed with another gentleman, and some bystander mentioned who it was.

Q. What was his manner in passing—did he seem agitated?

A. His gait was easy and natural, as on any ordinary occasion.

Q. Was he with or without a hat?

A. He had a hat on.

Q. You mentioned that you took up the hat of Mr. Stoughton; was it so?

A. I supposed, when I picked it up, it was Mr. Stoughton's, but it proved to be Mr. Goodwin's.

Q. Can you recollect whether, when you first saw Mr. Goodwin, his hat was off?

A. My impression is, that when Mr. Stoughton rose and struck Mr. Goodwin, he knocked Mr. Goodwin's hat off.

Q. By a juror. You stated that there were a few gentlemen below them; what distance do you think they were off?

A. I cannot precisely say; there were two or three, but my attention was drawn to the parties—they were not so near but that the parties had elbow room. They might be at a distance of four, five, or perhaps six feet. I cannot say exactly.

Q. Did they appear to be merely standing and looking at the parties?

A. It seemed so.

Q. By another juror. Did you perceive the cane at any time in the hands of Mr. Stoughton?

A. No. He had nothing in his hand.

Van Wyck. Have you seen the cane since so as to know it again?

A. I saw the dagger at the time, and have seen the cane since, but have no mark upon it. I know the general appearance of it.

Q. By a juror. When you said Mr. Stoughton returned the blow, at what time did you mean?

A. When Mr. Goodwin struck and knocked him down, he rose as quick as you may suppose a man could, and returned the blow.

Van Wyck (showing the witness two canes) asked him whether he could say which was the one.

A. My impression is (taking up that containing a dagger) that this is the one, though it does not now appear quite so long, but my impression is that it was such as that.

A juror. Are we to understand the witness that that is the same swordcane?

Witness. That is either the same dagger, or resembles it very much; but I presume many others might be produced amongst which I could not distinguish.

Second witness for the prosecution—Maltbie Weed.

Being sworn and desired to relate what he knew of the transaction, he stated as follows:

I was standing in the door of my store, on the southwest corner of Courtlandt-street and Broadway. While there, the two parties met nearly opposite the door on the corner of the curbstone. Mr. Goodwin was going down and Mr. Stoughton going up Broadway. As they met, Mr. Goodwin shook his cane in Mr. Stoughton's face.

Q. Did you hear any words at that time?

A. I did not, sir; a word or two passed, as I judged from the motion of their lips, but I did not hear them. After they had met and passed each other, Mr. Stoughton went on a few steps, and returned and stepped up to Mr. Goodwin. A word or two passed, as I judged from the motion of their lips, and then Mr. Stoughton struck Mr. Goodwin. After that, Mr. Goodwin brought up his cane and struck Mr. Stoughton; and as Mr. Stoughton received the blow, the sheathed part of the cane flew out. Mr. Stoughton then fell, on the receipt of the blow.

Q. How long did the conflict last?

A. I should think not more than four or five minutes, probably not so long.

Q. Did several blows pass?

A. I saw only two. One that Mr. Stoughton gave Mr. Goodwin, and one that Mr. Goodwin gave Mr. Stoughton. By that time, a number of spectators got round them, and as I remained standing in the door, I could not have a view of them.

Q. How were the parties dressed?

A. I believe Mr. Goodwin had a drab, and Mr. Stoughton had a blue great coat.

Q. Were there large capes to both their coats?

A. I believe there were, but cannot state very distinctly.

Q. Would you know the cane? Did you see it at the time?

A. Yes. I saw it at the time.

Q. Would you know it again?
A. I might, perhaps.
Q. Did you see it at the grand jury?
A. I did.
Q. Was that it? (*showing it.*)
A. According to my recollection, that is it. It was laid upon my counter; I only looked upon it, and laid it down again. My impression is, that this is the same.
Q. Did you see the position in which Mr. Stoughton fell?
A. He fell back from Mr. Goodwin.
Q. How long was it after the first blow till Mr. Stoughton fell?
A. One or two minutes, perhaps, before he fell first; rather more before they were parted and he fell the second time.
Q. After Mr. Stoughton rose, did any more blows pass between them?
A. I did not see Mr. Stoughton rise, except with the aid of some of the spectators.
Q. Do you mean after he fainted?
A. It was after he fell; I did not know that he had fainted. But it appeared to me, that after he fell he was raised by some of the spectators.
Q. Was he wounded at the time you speak of?
A. I do not know, sir, indeed.
Q. Was he not, after he fainted, carried into the store?
A. He was carried to Mr. Van Antwerp's stoop, and lay some time there.
Q. Did you see the dagger in the prisoner's hand after the deceased fell?
A. I did not, sir. He stepped into my store and out again.
Q. Might Mr. Stoughton have been stabbed in this conflict and you not see it?
A. I think he might.
Q. Had Mr. Stoughton any stick or weapon in his hand?
A. I did not see any.
Q. Which appeared to have the advantage in the conflict at first?
A. I thought they appeared to have equal advantage at the time I saw them, and I could see no advantage until Mr. Stoughton fell.
Q. Did you know the person of Mr. Stoughton?
A. I knew him by reputation and by sight.
Q. Did you know Mr. Goodwin at all?
A. No farther than by seeing him then and hearing him named.
Q. Did Mr. Stoughton usually pass that way about that time of day?
A. I do not know.
Q. Who was with Mr. Goodwin?
A. A person who I was told was Mr. Cambreleng.

Cross-examined by Hoffman.

Q. When Mr. Goodwin passed Mr. Stoughton, you say he continued on. What distance had he passed before Mr. Stoughton turned. Was it not to the opposite side of Courtlandt-street?

A. I think it was. They were nearly opposite my store when they passed at the southwest corner of Courtlandt-street. Mr. Goodwin continued his walk down Broadway.

Q. Did he continue on his way without halting, stopping, or looking back?

A. He did.

The Mayor. You think, sir, it was on the southwest corner of Courtlandt-street where they passed each other?

A. It was above my stoop a little, but nearly opposite my door, where they first passed. The affray took place just above, on the lower corner. After a few words had passed, Mr. Stoughton struck him on the shoulder.

Q. Were there any intermediate blows after Mr. Goodwin struck with the cane and the head flew off?

A. No, sir.

Q. Did you ever see Mr. Stoughton rise after the first blow?

A. I did not see him rise.

Q. You say Mr. Goodwin came into your store. Had he a hat on at that time?

A. I did not take notice. I cannot recollect.

Q. When he left your store, did he walk leisurely away?

A. I did not see him after that.

Q. Did he not come in to wait for his hat, and was he not standing there waiting till they could find it?

A. I cannot, indeed sir, recollect.

Q. When he lifted this cane and the sheath flew off, had he hold of the end or small part of the cane?

A. He held it so, (taking it by the large end.)

Q. Did Mr. Stoughton, upon that blow, immediately fall?

A. He did. I saw no blow whatever given by Mr. Goodwin after that.

Q. Did you see him even approach to strike him after that?

A. After that I had no distinct view, because of the crowd.

Q. By a Juror. Did you not see him after the sheath parted or flew off, or when Mr. Clark laid hold of him?

A. I did not see him then, for the spectators gathered about them.

Hoffman, producing a ground plan, asks witness whether, when they first met, they were not near the corner of the curbstone, and whether Mr. Stoughton did not afterwards advance near to the other corner before he turned round.

The Mayor then put other questions to the witness to fix the respective positions of the parties more definitely, to which he answered that the witness was accidentally at his door, he did not see Mr. Clark at all, he saw nobody join in the conflict, and saw no other weapon. Mr. Goodwin held the cane in his right hand, and stood nearly with his back towards the witness; his left side to the northward, but something obliquely; his right arm must have been visible to the witness.

Q. by a Juror. You say the sheath flew off when he struck, and

you saw no dagger; how do you know there was a dagger or a sword?

A. Immediately after Mr. Goodwin gave the deceased the blow, I saw the two parts of the cane on the cartway. The sword lay there immediately after Mr. Stoughton fell.

Van Wyck then produced a blue coat with capes, brought in by Mr. Stoughton's servant, which the witness supposed to be the same he had on, though he did not notice it particularly. (It was pierced at the part corresponding with the situation of the wound as described.)

Third witness for the prosecution—Dr. Valentine Mott.

Q. Did you examine Mr. Stoughton shortly after this happened? please to state what you saw and heard.

Witness. I should beg the permission of the court to look at the evidence I gave on the coroner's inquest, which I signed my name to, as something may have escaped my memory.

The Mayor. I think this would not be right. It is not like the case where a party makes a memorandum for his own use in a civil case, and is allowed to refresh his memory as to some particular facts; the reason then is different The witness then proceeded.

Witness. I was requested, but on what day of the week or month I cannot remember, to go and see a person said to have been killed in Broadway; when I arrived at the house, I found Mr. James Stoughton lying upon a counter dead. He was said to have been wounded, which led necessarily to the examination of his body. I found on the left side a wound, about an inch in length, perhaps less. From this wound had issued a little blood, which appeared particularly upon his linen. I introduced a probe into the wound, and found it went the whole length of the probe. I laid open his body for the purpose of ascertaining the extent and nature of this wound. And upon close inspection, I found that the wound passed through the lower part of the left lung, through the bag which surrounds the heart; and through the point or *apex* of the heart itself, transfixed the heart through the bag on the opposite side. And, I believe, the point of the instrument was arrested by the breastbone. In its passage through the heart, it opened the left ventricle or great cavity of the heart; and from the oblique direction which it took, it passed nearly through the right cavity or ventricle, but did not open it, passing only through the fleshy part. I should have stated that it passed between the ninth and tenth ribs, rather nearer the backbone than the middle of the body, and the violence with which it entered split off a portion of the lower or *tenth* rib; there was considerable blood, as of course, poured out into the chest near the heart. It was doubtless made with a pointed instrument.

The sword was now produced.

Q. Van Wyck. Do you suppose that instrument would have inflicted such a wound?

A. Such an instrument as that (if not that very instrument) would have produced such a wound. From the direction of the

wound, and its termination, it would have required an instrument of eight inches.

(Here the witness showed the district attorney, with the weapon in his hand, how it entered, about the middle of the line between the *sternum* and the back bone.) There is no doubt it occasioned his death. It was clearly a mortal wound.

Van Wyck. Could any kind of wound have occasioned death quicker than that?

A. It might be that other wounds would cause more instantaneous death.

Q. What other wound?

A. A wound made by such an instrument going into the right or principal artery of the system, called the *Aorta.*

Q. Would it not, if given with such force, have penetrated the breastbone?

A. It would have required very great velocity to have penetrated the breastbone.

Q. Could that wound have been given without a stroke?

A. Certainly it might by a fall, if a man fell upon it.

Q. If such a wound was given by a fall upon such an instrument, would the instrument fall out of itself?

A. I think not, unless it was drawn out.

Q. Could a person, having received such a wound, have strength enough immediately afterwards to rise?

A. Undoubtedly.

Q. How long might a person live after such a wound?

A. A very short time perhaps, or perhaps a number of hours, or even days. And persons have been known to live fourteen or sixteen days after a musket ball having passed through the heart, and opened one of the great cavities I have mentioned.

Q. If Mr. Stoughton had fallen upon the instrument, would it have fallen out again of itself?

A. Upon feeling this handle I perceive it is very heavy: it might have been extracted by being shaken, or caught, or brought out partly by its own weight and partly by the movement of the clothes, without being pulled out with the hand of any person.

Q. What clothes had Mr. Stoughton on?

A. A great coat, tight coat, and other usual clothing.

Q. Had he a flannel shirt?

A. I did not examine whether he had.

Q. Would it have fallen out if it had been struck through all those clothes?

A. It would have fallen more probably, because of those clothes moving about him.

Cross-examined by Mr. Emmet.

Q. You mention that it passed through all those clothes that you have named. Now I ask you whether, to inflict such a wound and pierce through so many obstacles, would not require more than ordinary strength? If you were not inclined by other circumstances to draw a conclusion, would you not think it more

likely to have happened from the weight of a person falling upon the weapon?

A. I have reflected a good deal, and am of opinion that the wound was more probably inflicted by a fall upon the instrument than by the hand of any person.

Q. Considering the entrance of this wound and its internal direction, do you think it likely to have been given by a man standing in front of another, and that other in the act of falling away from him?

A. I should not think it likely.

Q. One question more, doctor, if you please. The difficulty of its coming out unless drawn by the hand has been mentioned. Now if the weapon had entered thus, (showing) is there any improbability that it might have come out by the persons' lifting the deceased, or the motion of his clothes?

A. It might be so.

Van Wyck. Might not this have happened from a blow given with the force of a man in a scuffle?

A. It would then have been with more than ordinary violence, by a very strong person, with unusual effort.

Van Wyck. Might it have come out by means of the person who gave the blow still holding it, and the other falling off from it, or falling down.

A. I can conceive that the instrument may have been entered first by a blow or stab, and then that the person falling on it may have pushed it farther in: but it would not be a man of ordinary strength that could have given that wound with a blow simply. It would not be a man of our times. It may, however, have been in the hand, and the person killed by falling upon it.

Q. Must not he have fallen at the same time with the deceased?

A. That is the more probable way, for the instrument will not stand upright of itself. The body must, of course, in that case, have fallen upon it accidentally. It must have entered very violently and very suddenly. The weight of the deceased's body coming upon an instrument of that kind, might very easily occasion the wound.

Q. Is it not then probable that the weapon has first entered by a blow, and then the fall pressed it further into the body?

A. I think not, for the stroke of a person's hand would not probably have split the rib.

Q. Might not a man of considerable force, an athletic man, have struck hard enough to have split the rib?

A. I do not think it so likely to happen that way.

Q. Is that rib peculiarly strong?

A. No, the ribs are nearly of the same strength till you come lower down than the ninth or tenth.

Emmet. As the steel part of it is very small and light, and the handle large and heavy, might it not have possibly fallen with the

head downwards, and by meeting with some oblique surface conformable to its shape, have stood upright?

(N. B. The head of this dagger was not quite square or transverse, but somewhat bevelled and tipped with silver.)

A. Certainly it might.

Emmet. I observe that the edge towards the point of it is a little turned. Would it not have required great force to turn the edge in that way?

A. Certainly.

Emmet. Would it not have required more than superhuman force to have inflicted such a wound upon a man who was at the moment falling away from the person striking?

A. I think such an effort of muscular strength would have been required at least, as would have made the action by which it was exerted very manifest.

Van Wyck. Might not such a number of wide capes have still prevented the action or motion from being distinctly seen?

A. If it had been a simple or ordinary wound, they might: but not, I think, so violent an exertion as this must have been. Both suppositions are possible, but the other is more probable.

A Juror. Could a person standing face to face with another, inflict a wound in the place where this was given?

A. I think it might be done: but it must have been done very deliberately and designedly, and by a man of very extraordinary strength.

The Mayor. If the two parties stood opposite each other, it could only be done by stretching the arm and reaching with the hand round the body of Mr. Stoughton?

A. In order to pierce the body as it did, it must have been entered with the hand very far behind.

Here *Mr. Van Wyck* stood up to give the witness an opportunity of demonstrating his opinion. And *Mr. Emmet* in like manner begged of *Mr. Ogden* to stand in the position supposed to be that of the deceased. *Mr. Wells* also stood up, and placing himself a little sideways, asked, whether it might not have been easily done with the arm, supposing the party so far turned. *Mr. Emmet* asked, in that case, whether it would not have rather passed straight through the body, and not upwards. To ascertain the relative positions of the parties, and their attitudes, *Griffin* begged to call *Mr. Clark* again; he was accordingly called and further examined.

Witness. I came up when Mr. Stoughton was about to give Mr. Goodwin a blow, and I took Stoughton by the collar with my left hand; Mr. Goodwin's face was then on my right hand. They were standing nearly fronting each other, with about the breadth of my body between them.

Messrs. Van Wyck and *Griffin* then stood up, that Mr. Clark might place them before the court and jury in the manner the parties were, in respect to each other.

Emmet. If Mr. Goodwin had inflicted the wound, he must have

stretched not only round the body of the deceased, but across a space equal to yours.

It being now 5 o'clock, the mayor, after cautioning the jury not to talk upon the subject so as to make up their minds, till they had heard the rest of the testimony, observed that some refreshment was prepared for them, lest the fatigue they were likely to undergo might overcome their strength, and render them incompetent to their duties.

The jury were then committed to the charge of several of the officers duly sworn for that purpose, and the court adjourned till 6 o'clock.

At 6 o'clock P. M. the court met.

PRESENT AS BEFORE.

The jury were called over, and each answering to his name, the trial proceeded.

Fourth witness for the prosecution—Dr. Cyrus Perkins.

Witness. I examined the body of Mr. Stoughton, and observed a wound through the skin about half an inch long, between the ninth and tenth ribs, somewhat nearer the back than the breastbone. Its direction was upwards, and probably touched the breastbone; which, however, was not examined to see whether it was wounded. The instrument passed through the left lung, and through the heart and the sack which contains it. In passing through the heart, it opened one of its principal cavities. I suppose the instrument penetrated about ten inches.

Q. Did you see the instrument?

A. I saw that which it was said made the wound. (*Mr. Van Wyck* shows the witness the sword.) I examined the instrument at the time; this appears to me like it.

Q. Did you examine the clothes to see if they were perforated?

A. I did not. This was at the dissection by Doctor Mott. I did not examine the wound, I only judged from the size of the body, and the direction in which the wound was traced, and had no doubt that the wound occasioned the death. Mr. Stoughton was dead when I came there. I perceived that the lower edge of the *ninth rib* was wounded where it was very thin, and the edge was split off.

Q. Could a man of ordinary strength have given a blow with such an instrument, so as to split the rib, and then penetrate the body as was done?

A. It is my belief that it would not have required very great force.

Q. Are you very certain as to the rib which was wounded?

A. I have no doubt.

Q. How was the direction of the wound?

A. Forwards, upwards, and inwards, towards the centre of the body.

Q. If the instrument had entered by a blow, would it probably have fallen out of itself?

A. I think it doubtful; I could not give a confident opinion upon that point.

Q. Is the interior part of the body and the substance through which it passed, such as would probably retain it?

A. The skin itself would retain it, more than any other part through which it passed, from its elasticity. The instrument had only one cutting edge, so that the skin must have closed round, and adhered strongly to the instrument.

Q. Would that part of the heart through which it passed hold it?

A. More closely than any other through which it went, being a strong muscular part.

Q. Supposing two persons in close conflict, would it have been possible for one to have struck the other in this way?

A. It would depend upon their relative situations.

Q. If they stood front to front?

A. If they did, and were near enough, there would be no difficulty in inflicting a wound of that kind.

Q. Could it have been given by a person holding the dagger that way? (holding it after the manner of a hand and dagger in heraldry.)

A. If the two persons were of equal height, it would be hard, unless one stood in some way higher than the other.

Q. Suppose they stood on equal ground, and the party struck under the arm of the other?

A. It ought then to be done this way: (turning the instrument the other way.)

Mr. Wells and *Mr. Van Wyck* again stood up, that the witness might explain his exact meaning.

Q. Supposing the parties to be clinched at the time?

Witness. I think any man may tell just as well as I can.

Griffin. Would you have personal strength enough to force that into the body of a man to its whole extent? have you any doubt of your power to plunge it ten inches into a human body?

A. I have not.

Alderman Allen. Standing right front to front, it could only be done in this way: (with the arm round, and the point returning.) Could you employ your whole strength in that way?

A. Not so well as in other ways of using it.

Q. At what angle with the vertical line do you think it entered the body?

A. I think about forty-five degrees, or not far from that.

Q. Have you any doubts that you would have strength enough to give such a blow?

A. I should not have any doubt that any person could do it: for I understood Dr. Mott to speak of the edge of the rib. Now the upper edge of the rib is thick, but the lower is thin, and would resist but little, and it was the lower edge that was splintered.

Q. Have you reflected on the circumstances of probability, how far this might be by a fall or by a blow?

A. I have heard it suggested, and therefore have reflected. There is but one way with any probability that it could have happened from a fall. The range of possibility indeed is very wide; but if it was from a fall, I think the instrument must have been held in the hand this way, (as last described) and the other party then have fallen upon it, and both have fallen together.

Q. Is there any probability of its having fallen upon the head and stood up?

A. It is possible, but not at all probable.

Q. Which is most probable, the blow or the fall?

A. I would rather not answer that question, if it is not necessary.

Q. The question is, whether you think it most probable that it was by a blow or by a fall?

A. As there is only one way in which it could be inflicted by a fall, and many by a blow, I must think it was more probably by a blow.

Q. Might it probably fall out of itself?

A. I should not expect that it would fall out instantly, but it might.

Q. Suppose it to have passed through the coat, great coat, waistcoat and shirt?

A. I think the skin alone would make more resistance than all the rest.

Q. Could the party, in your opinion, who inflicted the wound, when the deceased fell off from him, have parted with and left it in his body, and it then have fallen out of itself?

A. I think the one who inflicted the wound must rather have fallen with the other. He must either have left it, or used some exertion to withdraw it.

Q. How long do you presume the party could have lived after receiving this wound?

A. It is not possible to say with certainty. There are some extraordinary cases; but I should not think that one so wounded could live above five minutes—I judge from other similar cases. I have known instances of men who have inflicted very heavy blows after receiving such death wounds.

Cross-examined by Emmet.

Q. Was it not Dr. Mott that performed the operation?

A. It was.

Q. You say it struck the lower part of the ninth rib—would not that change its first direction?

A. It would in some degree.

Q. Would the striking upon the upper part of the tenth rib, have changed it so as to make it take a more horizontal direction?

A. Striking the lower part would have deflected it perhaps, and brought it nearer to a horizontal course.

Q. You stated several ways in which the wound might have been given by one person to another. If they were clinched together you say, it could be done thus: (over his shoulder.) But is not that a way that would much diminish the force of the party striking?

A. Unless he stood a good deal higher than the shoulder of the other, it would.

Q. Must he not stand so much higher as that his breast would be higher than the shoulder of the other?

A. I doubt whether he need be so much higher.

Q. Must he not then be so much above as to be able to stretch over till his arm could reach nearly the length of the instrument below the wound?

A. Half the length of the instrument would suffice if I was right in saying that it entered at an angle of 45 degrees.

Q. Must not the parties have been quite close to render this possible: so close that he could have the length of his arm increased by his body leaning over?

A. Certainly, they must have been close to each other.

Q. He must then have his arm raised and passed over the shoulder of his adversary? Could that have been done in the public street before crowds of spectators, and not one see it?

A. I can conceive nothing but the capes of the coat to prevent its being seen. I think it extraordinary that no one should have perceived such a movement as that.

Q. Then if the wound was inflicted in that way, how must the instrument have been withdrawn?

A. It must have been over the shoulder or by the side.

Q. The arm then must have descended again in the same *diagonal* direction in order to draw it out, and to the extent of its whole length?

A. I cannot say, sir.

Q. We must take the case as proved by the witnesses. Both were standing on the pavement opposite each other; Mr. Stoughton being as tall or taller than Mr. Goodwin, and it is to be determined which of the two ways is most probable, the blow or the fall?

A. I think it quite improbable, if they stood equally high, that the wound could have been given over the shoulder.

Q. If they were fronting each other, like men in close conflict, would it not be more probable that it should have happened by the falling on the instrument?

A. I think it would.

Van Wyck. If they were upon even ground in close conflict, and the arm of the party receiving the blow raised, would there have been any difficulty then?

A. I think not, if they were close to each other.

Q. Supposing it not over the shoulder, and the two parties merely struggling, do you see any real difficulty?

A. If the back of one was bent down I should not.

Q. In a common and ordinary scuffle, would there not be a variety of situations where it could be done?

A. No doubt: in such scuffles, men fall into almost all possible situations.

Q. If so, might not this blow have been given and not seen?

A. I think the dagger would be seen, unless the capes of the coat prevented it.

Emmet. It is now mentioned that the wound might be given under the arm; if so, and it struck against the lower part of the ninth rib, would it not glance and take a more horizontal direction?

A. That is the way it would be.

Emmet. Though the cape might hide the point, could it also have hid the hand?

A. It could not well hide the hand.

Emmet. Would not all the spectators then have seen the hand, since the whole could not have been concealed under the cape?

The Mayor now observed, that when physicians were called, it was on professional questions; that the knowledge of a physician was not at all preferable to that of any other man in answering the inquiries now made; and appealed to Mr. Emmet himself, whether the jury were not as good judges how blows could be given, as the most learned physicians, who are only experts in their own science.

Emmet. They are, however, used to judge of wounds, and their direction and effects.

Van Wyck. Would not a fall have the same effect as to changing the direction?

A. I think so.

Emmet. That calls for another question. If the wound was by the *weight* of the body falling, would it not equally have changed the direction?

A. If he had fallen, I think the point of the instrument would have penetrated the breastbone, where it appears it stopped.

The Mayor. You mean, that a body moving with velocity, is not so easily deflected from its course?

Witness explained, that it would if it had velocity, more easily split the rib, and more distinctly follow its course.

Emmet. If the person fell upon it, would it not be more likely to break the rib and pursue its direction?

No answer.

Fifth Witness for the Prosecution—William Weir.

I was coming up from the customhouse, after three o'clock, opposite Courtlandt-street on the Maiden-lane side; I saw two gentlemen scuffling in the street, about the centre of Courtlandt-street. I staid ten or fifteen seconds, and saw them closed; and Mr. Goodwin repeating several blows on the head of Mr. Stoughton, upon which he fell. After he fell, I perceived Mr. Goodwin making several blows at him when he was down; upon which I crossed the street, and by the time I arrived about the head of Courtlandt-street, they were both on their feet. I saw a number of people about Mr. Stoughton, and very few about Mr. Goodwin. At the same time, I saw Mr. Stoughton make an effort to meet Mr. Goodwin again; the people present immediately rushed in between them, and I went towards Mr. Goodwin. Mr. Goodwin had walked back towards the southwest corner of Courtlandt-street. I turned

round and saw Mr. Stoughton apparently fainting, which drew my attention towards him, and he almost instantly fell; I thought he appeared to be dying. I then turned to Mr. Goodwin and said, you have killed the man. At the time I saw Mr. Stoughton fall, I saw the dagger part of a swordcane in Mr. Goodwin's hand. It was about that time, I am not sure whether before or after, that some one made the observation that he had killed the man, and he said he did not intend to have drawn *that*. Shortly after that he held a hat, whether he had taken it off his head I cannot say, but he held it before him and said, this is not my hat. It was, perhaps, a moment after, that some one observed it was of no consequence, he had better take it; very soon after, he went away with another gentleman down Broadway.

Q. How soon did you observe the swordcane in the hands of Mr. Goodwin?

A. I observed him at the first strike with something that I took to be a cane, but I did not know: I had no idea that it was a swordcane.

Q. How far in the street did Mr. Stoughton fall?

A. Near the centre of the street—clear of the curbstone, and rather without the crossing stones, his head towards Broadway.

Q. Did Mr. Goodwin make any reply to the observation, you have killed the man?

A. I heard him say to some one that Stoughton struck him first. I was asked before the grand jury how Mr. Goodwin looked when he said those words. I answered, that I thought he looked surprised on seeing the dagger.

Cross-examined by Hoffman.

Q. I understand you were on the right side of Broadway. Were there any persons between you and them when you first discovered them?

A. None. Mr. Stoughton seemed rather retreating, and Mr. Goodwin pressing him, and their arms were flying about.

Q. What was Mr. Goodwin striking Mr. Stoughton with when you saw them?

A. I took it to be a cane. I did not see any thing like a sword.

Q. Did not you before say that he had the blade in his hand?

A. I said I thought it was a cane he was striking with.

The Mayor. Where were they at the first?

A. Rather on the lower side. At the curb Mr. Stoughton fell rather more towards the upper or northern side.

Q. Are you sure you saw him strike him when he was down?

A. I am.

Q. Are you as sure of that as of any thing you have testified to?

A. I am.

Q. Did you see any blows behind his head?

A. I thought he struck him upon his head.

Q. Were there not many persons near them?

A. There were some nigh, and at the time I saw him strike him,

a great many ran across the street. When I got there they were both on their feet.

Q. Did you see Mr. Clark and Mr. Cambreleng there?

A. I did not see Mr. Clark—I saw Mr. Cambreleng.

Q. Was you standing near Mr. Cambreleng at this time?

A. I did not see him for some little time. The first time I saw him, he was standing on the curbstone at the corner of Courtlandt-street.

Q. Did you assist in carrying Mr. Stoughton?

A. I did.

Q. Did much confusion arise?

A. A great deal.

Q. Who was in company with you when you went up Broadway?

A. Mr. Haycock, of the customhouse, and Mr. Ball.

Q. How much time was consumed in the whole of what you saw?

A. I cannot positively say.

Q. Have you said, on a former occasion, that the whole did not exceed thirty seconds?

A. I think not more.

Q. And during that time you crossed over from the east to the west side of Broadway?

Q. By a Juror. Did you see the sheath fly out of his hand?

A. No. I thought it was nothing but a cane, till I saw the dagger afterwards in Mr. Goodwin's hand.

Q. By a Juror. Was Mr. Goodwin all the time on his feet?

A. He was.

Sixth Witness for the Prosecution—William Haycock.

Witness. I saw the affray. I was passing up Broadway at three o'clock, on the right side, near the corner of Maiden-lane. I heard somebody call out, a fight. I looked over and saw two gentlemen fighting, and making at one another. One had a cane, and the other was apparently using his arms. After two or three blows had passed with the cane and the arms, one of the gentlemen fell. About a second afterwards I saw Mr. Goodwin jump along side of him and strike him several blows with the head of the cane—three or four blows—he had a white glove. I saw nothing but the handle of the cane. He struck him several blows when he was down. I ran over, and Mr. Stoughton was raised up by one or two porters and other people. There was a crowd collected. Mr. Goodwin put his head in and looked over my shoulder at Mr. Stoughton. They looked at each other. Mr. Goodwin looked at him, apparently with the intention of commencing the battle again; and some person observed that he had done enough, and that he had better be off. Mr. Stoughton, immediately after that, fell; and it was observed by some one that he had a fit. I then assisted, with some others, to raise him out of the street, and he was brought on the sidewalk. He never spoke at all after he was raised up. I was

with him from the time he was raised, after his first fall, till near the moment of his death. I never saw the swordcane in Mr. Goodwin's hand after he had been raised up the first time. But some person called out, here is a dagger found, and it was held up (I believe) by Mr. Weed : and somebody said, the man has been stabbed. Mr. Stoughton was then removed, and was lying on the platform in front of Mr. Weed's store. When he was carried into the store, some one (I think Mr. Clark) asked me if I did not see some blood. This was the next store to the corner of Courtlandt-street —I believe it was at Mr. Van Antwerp's store. I there assisted in taking off his clothes and opening his shirt neck. I undid one of his braces, and lowering his pantaloons, observed some blood. There came several doctors in : Doctors Cooper, Mott, Perkins, and Dr. Nelson was the last. The wound was very small.

Cross-examined by Hoffman.

Were you no nearer than the opposite side of the street when the blows were given ?

A. I ran over upon seeing the blows.

Q. Did you see Mr. Clark then ?

A. I saw a quaker gentleman whom I suppose to be Mr. Clark.

Q. When you first saw this gentleman, had not Mr. Stoughton a hold of Mr. Goodwin by the collar ?

A. I could not tell ; the arms of both appeared to be in motion.

Q. When did you first see the dagger ?

A. I had a very transient view of it at any time. When it was held up by Mr. Weed, I supposed that he had found it on the ground, near the spot.

Q. Was Mr. Goodwin gone before you saw the dagger ?

A. I do not know when he went.

Q. Was the body lying on the stoop when you saw it ?

A. I believe not—I think not : it was when he was on the pavement.

Mayor. Do you think, when you saw the dagger, the body was on the sidewalk ?

No answer.

By one of the Aldermen. Where did he fall ?

A. Near the gutter, I think ; three or four feet from the lower side of Courtlandt-street.

Seventh Witness for the Prosecution—Leonard Baker.

Witness was standing on the stoop of the stage office, between six and seven yards from where the affray happened—was looking directly into Broadway—saw two gentlemen meet : one with a blue coat, the other with a light drab. They closed immediately—the man with the blue coat struck the one with the light coat. It was very near the south corner—some blows ensued, and very soon I saw the man in blue fall on his back, in Broadway.

Q. What took place after that ?

A. The next thing, I saw Mr. Goodwin seemed to be standing

over Mr. Stoughton, who was down on the ground, and Mr. Clark was holding him with his arms round him. I next saw Mr. Goodwin on the sidewalk; he had something in his hand like a sword-cane—he threw it down—some gentleman put a hat upon his head, and he walked away. He was much surprised, apparently, at the dagger, as if he did not know what he had in his hand.

The Mayor. Did you see him strike Mr. Stoughton when he was down?

A. I thought he was slapping him in the face—I did not see any cane at all.

Cross-examined by Hoffman.

Q. Was it merely with his open hand that he struck?

A. It appeared so. I saw no cane at that time. I will not be sure whether he threw it down, or some person took it out of his hand. I did not see the cane in his hand at any time before Mr. Stoughton fell.

Q. Were there not blows with the fists between these gentlemen?

A. I thought so.

Q. Did you see what took place on the flagstones or in the street?

A. They met on the walk, and when Mr. Stoughton fell, it was with his head towards Maiden-lane, and his feet two or three feet from the curbstone.

Q. Did you hear Mr. Goodwin say these words: "this is not my hat?"

A. I did not hear him say one word.

Q. Did he go away very hastily, or how did he appear?

A. He seemed in a very great passion.

Q. When you first saw him, had he his hat on?

A. He had not.

Q. by Griffin. When you saw him throw away the dagger, did he then seem in a violent passion?

A. He did.

The Mayor. Did I understand you that you never saw the dagger or cane until after Mr. Stoughton had fainted?

A. It was so, sir; I neither saw the cane nor the dagger.

Eighth Witness for the Prosecution—Alexander J. M'Williams.

Witness being desired by *Mr. Van Wyck*, as the other witnesses had been, to state what he knew, said: On the 31st of last December I was coming up Broadway, and saw two gentlemen fighting; I was on Maiden-lane side. By the time I came to Maiden-lane, I saw Mr. Stoughton down, and Mr. Goodwin over him as if striking him, or going to strike him. This was near the centre of the head of Courtlandt-street. I went over then and saw Mr. Stoughton lying in the street, and got hold of him and asked him to get up. He did not speak, and with the assistance of another person, we raised him up—Mr. Goodwin was on the sidewalk when he got on his feet; he stood about six minutes alone—he seemed as if he wished

to speak but could not. Mr. Goodwin was looking at him and he at Mr. Goodwin. I saw neither the sword nor the sheath; he rested his head upon me about fourteen seconds, and as he was falling, I with some other person recovered him; at that time Mr. Goodwin was not doing any thing, but after Mr. Stoughton fainted, he went into the corner store.

Q. Did you hear Mr. Goodwin say any thing?

A. I did not; I never heard him say any thing at any time. I did not see him get a hat. They carried Mr. Stoughton to the second stoop from the corner: and I afterwards saw Mr. Goodwin going quite deliberately down Broadway with another gentleman, while the deceased was on the stoop.

Cross-examined by Hoffman.

Q. Did you see any cane or stick at any time when they were fighting?

A. No, sir; it appeared to be with their fists. When I crossed, the prisoner was in the act of striking, or just going to strike, with his fist.

Q. Was his fist clenched, or was it with the flat hand?

A. I think it was with the flat hand.

Q. Did you see him give any blows?

A. No. I saw him attempting it. He had neither cane, nor stick, nor any thing of that kind in his hand at that time. I never saw sword, stick, or cane, until after Mr. Stoughton was raised the second time, nor then, till after he fainted. When they looked at each other after we had raised him the first time, there was a space of about five feet between them: Mr. Goodwin was on the sidewalk, and Mr. Stoughton in the street.

Q. Did you distinctly see Mr. Goodwin?

A. I saw him, certainly.

Q. Had he any thing in his hand then, as you recollect?

A. I cannot say, whether he had any thing at that time; it was after Mr. Stoughton fainted that I saw the thing in Mr. Goodwin's hand.

Q. After you had raised up Mr. Stoughton the first time, were they near enough to give each other blows?

A. They were near enough to reach at each other; but there were several persons between them, and no blows passed.

Q. Did you see Mr. Clark, the quaker gentleman?

A. I do not know Mr. Clark, but I believe it was a quaker gentleman that helped me to raise him up.

Q. Did Mr. Stoughton offer to make any blows after he rose up?

A. O no, sir, he was not able.

Q. *by a Juror.* If Mr. Goodwin had any thing in his hand, would you not have seen it?

A. I think I should have seen it, if he had.

Q. Did you see Mr. Goodwin go back to the sidewalk?

A. I did.

Juror. Did the deceased speak after the time he was lifted up?

A. He did not.

It was now 9 o'clock, and the court was adjourned until 11 next morning. It was ordered that the jurors should be kept by two marshals and a deputy sheriff; these officers were duly sworn to keep them, &c. and they were taken to the District Court Room, where they were accommodated with supper and beds.

SECOND DAY.—WEDNESDAY, MARCH 15th.

At 11 o'clock A. M. the Court met.

PRESENT AS BEFORE.

The jury were called over, and all answered to their names. The prisoner being again put to the bar, the jurors on the general panel not empanelled in this cause, were informed, that they had permission to withdraw until the following morning, at the usual hour.

Ninth Witness for the Prosecution—Thaddeus Phelps.

On the day of the conflict between Mr. Goodwin and Mr. Stoughton, about three in the afternoon, as I was coming down Broadway, my attention was arrested by a conflict near the southwest corner of Courtlandt-street. When I first saw them, they were opposite King and Mead's store, the same side where I was passing—the west side. I was between thirty and fifty yards above King and Mead's. When I arrived on the ground, there were but four or five persons present. When I first saw the parties, there were but three. I am not confident, though under the impression, that I helped Mr. Stoughton up. At all events, I was there at the time of his getting up. After he was placed in an erect posture, he reclined upon the shoulder of a gentleman. Here I wish to correct a part of my testimony before the grand jury and the inquest, where I stated that it was upon the arm of Mr. Clark: but upon seeing Mr. M'Williams yesterday, I was undeceived, and am now sure it was upon his arm. I had never seen either of those gentlemen before. The first I discovered of Mr. Goodwin was, he was in a stooping posture, on the confines of the curbstone, and apparently taking up his hat. He was on the sidewalk, and Mr. Stoughton on the paved way, from five to eight feet off. Mr. Stoughton getting up a moment after, and reclining upon Mr. M'Williams, looked with a great deal of passion, as I observed, at his opponent, who had turned round, which led me to attach no great importance to any thing that had taken place: for from the manner and attitude of both the parties, my impression was that it was the intention of both to renew the fight, and that Mr. Stoughton was only recovering himself for the purpose. I stood perhaps about four feet from Mr. Stoughton, with a full view of his countenance, and my attention was alternately directed to the countenance of both. In this position I remained till Mr. Stoughton fell, or fainted. The change of his countenance was sudden and instantaneous, from life to death. He was

caught by one or two of the bystanders, when the first impulse of my feelings directed me to Mr. Stoughton's relief. According to my impression, I assisted in carrying his body to Mr. Van Antwerp's store, the second store, I think, from the corner. We at first thought of taking him into that next the corner. At the time of conveying the body, I saw Mr. Goodwin in the crowd. We made all haste, after laying him down, to take off his neckcloth, and open his clothes, to give him a chance of respiration. I assisted in keeping the crowd back, to prevent their pressing too much upon him. While we were engaged in getting off his clothes, a person came up to me and asked me to look and see if Mr. Stoughton had not been stabbed. I requested the person near Mr. Stoughton to look, and another person said, O no, the wound is in his head. I saw no mark or contusion on the head, only a small scratch a little over the temple. Mr. Stoughton at that time appeared to be in the last agonies of death, lying on the threshold of the store. Some one came up whom I believe to be Mr. Cambreleng, and I said, he is a dead man. At that moment I perceived Mr. Stoughton to open his eyes, and thought that if a vein was opened, he might get relief. I had asked several persons to go for a doctor, but nobody would. I saw Mr. Goodwin with Mr. Cambreleng, who went away. When I returned with the doctor, Mr. Stoughton was dead. I saw a cane when my attention was first arrested. It appeared to me that the parties were all contending for it, for I thought there were three in the struggle: but I saw nothing of the cane after my arrival on the ground. I afterwards understood that the third person was Mr. Clark. I cannot say I saw Mr. Stoughton fall, and as to Mr. Goodwin, he seemed quite composed. Mr. Stoughton seemed to look attentively at Mr. Goodwin, and Mr. Goodwin at him, but not particularly agitated. Mr. Stoughton never uttered a word, nor Mr. Goodwin neither. I never thought of any wound having been inflicted, nor did I see the cane after the first sight of it, when they were brandishing it among them; and then it appeared to me to be simply a cane up in the air, and some persons striving for it. I paid little attention to it. I am not certain whether Mr. Stoughton had risen at the moment I came, or whether I helped him. I know he had been down, and stood after he got up for 30 seconds, or from that to a minute, on his feet.

Cross-examined by Hoffman.

Witness said, that when he saw these gentlemen, they appeared to be in a scuffle—that there were three persons. But he cannot, from any subsequent circumstances, say whether Mr. Clark was the third or not. He had no recollection of seeing Mr. Stoughton fall, but he must have fallen, of course, as he approached, for the parties appeared to be all on their feet when he came up. He saw no blows given after Mr. Stoughton was down, nor after he came up. The situation of the parties was such, that there could not have been any blows, for Mr. Goodwin was not, at any time, within six or eight feet of Mr. Stoughton. Goodwin was within the curb,

and Stoughton outside, from five to seven feet. I saw no blow on either side; but there seemed to be a scramble for the cane.

Q. Was there any thing to prevent you, as you approached, to see whether Mr. Stoughton was down or not?

A. I think not. I was the fifth or sixth person that came; and had as good a view, I think, as any one there. As I apprehended they were about to renew the fight, I turned my eyes upon them alternately. After Mr. Stoughton got upon his feet he never changed his position at all. If there had been blows given when he was down, I should think it very strange that I should not have seen them.

Q. Did Mr. Goodwin appear to be composed after that?

A. He appeared very composed indeed, considering his situation.

Mr. Phelps was about retiring, when the mayor asked whether he could recollect if the third person was Mr. M'Williams, but he could not, having paid little attention, except to the combatants.

Tenth Witness for the Prosecution—John H. Ball.

Witness. I was going up Broadway, when I observed a scuffle between Mr. Stoughton and Mr. Goodwin, and immediately crossed over. Mr. Stoughton was then down; Mr. Goodwin stood on the edge of the curb: I was immediately before him. Mr. Stoughton rose and leaned on a gentleman's shoulder, and after a short time fell backwards suddenly. Mr. Goodwin held the sword part of the swordcane, swinging it by the head between his thumb and fingers, the blade dangling down. This was at the time Mr. Stoughton was down the second time. Mr. Goodwin said some words, which I did not exactly hear. I observed the cane while I was on the opposite side of the street. I saw Mr. Goodwin strike at Mr. Stoughton, holding it by the but end. Mr. Goodwin had a large cape coat on, and Mr. Stoughton also: I saw him strike Mr. Stoughton over the head, holding it short.

Q. By Van Wyck. Did you perceive any particular blow, which caused him to fall?

A. I did not. I was surprised to find he did fall from the blow, which did not appear to me very violent. I did not observe Mr. Goodwin change the direction of the instrument. I did not observe whether he dropped the swordcane, but when Mr. Stoughton was lying down the second time, I saw it swinging in his fingers. I was going home in company with Mr. Haycock and Mr. Weir.

Cross-examined by Mr. Hoffman.

Witness says he does not know Mr. M'Williams, but that he thought and is sure he saw Mr. Goodwin strike when Mr. Stoughton was falling the first time.

Q. Did you see him strike after that fall?

A. No. I saw him strike when he was falling, but not after. I crossed with Mr. Weir and Mr. Haycock, and assisted in carrying

him into the house. When I came up I saw the prisoner on the curbstone. The whole did not last longer than five minutes; I cannot say how long from the first time I saw them, until Mr. Stoughton lay on the ground. It could not be more than four or five minutes, as I walked fast across.

Juror. When you saw the prisoner strike Mr. Stoughton with the cane, was the sword sheathed or naked? Had he hold of the cane or the sword?

A. I thought it was a cane at that time, and that he held it near the handle, but the large capes prevented me from seeing more.

Juror. Where did he appear to strike him when he was falling?

A. All the blows appeared to be aimed at the head.

Eleventh Witness for the Prosecution—Michael M'Gowan.

Witness. I had been for a long time past an orange seller. I was standing at the lower corner of Courtlandt-street and Broadway, where Mr. Weed lives, when I saw a gentleman coming down facing towards the battery. I stooped to move my oranges and shift them in the basket; and when I looked up, I saw two gentlemen engaged, just on the curbstone, close by me. Mr. Goodwin happened to be next to me, and the other facing me; and he struck at him with a sword or dagger. I believe it was a dagger with the butt end foremost. I did not see the other part of the cane; he held the blade and struck him on the back of the head with the handle. Mr. Stoughton was going back and he after him, till they came to the middle of Courtlandt-street. Shortly after that Mr. Stoughton fell before him, and Mr. Goodwin came up to him and struck him in the same manner after he fell, and when he was on the ground.

Q. Had he still the dagger in his hand, and did he still strike him with that?

A. It appeared to me to be so. While Mr. Stoughton was up, he was making resistance, with his hands up to save his head. I cannot say whether Mr. Goodwin had hold of him. I did not observe him strike him anywhere but on the head, as long as he was up. He retreated four or five yards before he fell. I did not see Mr. Stoughton give any blows as he was retreating.

Q. Did you see Mr. Goodwin immediately after Mr. Stoughton fell?

A. There came a gentleman forward in quaker's apparel, and took hold of Mr. Goodwin; I cannot say whether the swordcane was still in his hand. After Mr. Stoughton was down, Mr. Goodwin went back on the curbstone—a moment or two after. At the time he struck him, he was on the pavement. Mr. Stoughton fell on his rump; I had no thought of his falling when he did fall. They were so near hand, that it appeared to me he could not knock him down. Mr. Stoughton's heels flew up, and he went on his back; I saw him as he was helped up. Whether he was able to raise himself I do not know, nor do I know who helped him. I remarked six or seven men and boys who came from the opposite side of Broadway and

Courtlandt-street: I do not know exactly where they came from. The gentlemen staid till they saw him struck, and then came to his assistance.

Cross-examined by Hoffman.

Witness did not see Mr. Stoughton strike Mr. Goodwin at all at any time—both their hats fell off. The quaker gentleman took hold of Mr. Goodwin; the people came up, and I don't know whether Mr. Clark helped Mr. Stoughton up or not. The people that were coming along stopped at both sides. At the time of the first fall I did not observe many people.

Q. Why did you not go to his assistance, seeing him so ill used?

A. I would have gone to the gentleman's assistance, but because of the basket I had in my care, and that I thought the others would go, and I was surprised they did not interfere.

Twelfth Witness for the Prosecution—Dr. Charles L. H. Schieffelin.

Witness being asked, stated that he was a physician and surgeon, and proceeded: I was going down Broadway on the 21st of December, about half past three; Mr. Vanderbilt (the coroner) asked me to stay till he formed his jury; I was not willing to take the responsibility, and I came up to the Hall and found Doctor Mott, who went down to the store, and after he had got a case of instruments, we examined the body. The external wound was about an inch in length, about the ninth and tenth ribs; its direction was inward, upward, and forward. There was a rib wounded, I think the tenth; a very small part of it was fractured off—a very small splinter. There was a dent in the lower part of the breastbone. The wound entered about two inches from the backbone, and went in about nine or ten inches. I am not certain as to which rib was wounded, I rather think it was the tenth rib. I was on the right side of the body, and I think, when I introduced my finger, it was the lower rib.

Here the testimony of the witness ended, and some conversation took place between the members of the court, when the mayor spoke to the jury, observing to them, that from the great length of the examinations and variety of testimony, and number of witnesses, it would be impossible to get through the trial without further adjournments; and it would be difficult to keep so good order among so great a crowd, if they continued sitting through the night. He thought, however, that the jury were, and ought to be consulted, and the court were willing to yield to their convenience. If, however, it was no greater hardship to them to continue sitting till daylight, and then to adjourn, it would give the court a better opportunity of considering the mass of testimony offered, and assisting the jury in their enquiries.

To this the jurors all readily assented; and the mayor then mentioned that an attempt had been made to get a letter in to one of the jurors, which was an act of great impropriety. The sheriff stated the difficulty if the jury were at liberty to prevent communications

with them. The mayor observed, that he was willing to trust much to the discretion of the jury, for we were all equally interested in the administration of justice, and an impartial trial in every case.

One of the jurors observed, that it was the particular wish of the jury, that the strictest care should be taken, and guard kept.

Thirteenth Witness for the Prosecution—Dr. John Nelson.

Witness. On the day when Mr. Stoughton received the wound, I was called on by Mr. Phelps, to go with him to a person that had received a wound. I saw Mr. Stoughton lying in a store, and my first impression on seeing him was, that he was mortally wounded; and I at once expressed that opinion to Mr. Phelps, for the countenance of the deceased was fully indicative of the fact; and he indeed died a few moments afterwards. It was a wound about half an inch in length, given by some penetrating instrument.

Van Wyck. Suppose a wound between the ninth and tenth ribs, and that the instrument should take the rib so as to penetrate it a little, and afterwards to pass through the heart and reach the breastbone, could all that be done by the strength of an ordinary man?

A. I think a man of ordinary strength, in a paroxysm of rage, which adds much to muscular force, could with such an instrument as that penetrate to the breastbone.

Q. Would it vary your opinion if the instrument touched the upper side of the ninth, or the lower side of the tenth rib?

A. It would not. I think a man of ordinary strength could give such a blow.

Q. If the instrument was lodged in the body, in that direction, and to that depth, would it be likely to fall out of itself?

A. If it was not fixed in the breastbone it might. The adhesion of the skin would oppose the principal impediment to its falling out, but the head of the instrument I perceive is heavy. There is very little between the rib and the breastbone to prevent it.

Q. Would not the heart retain it?

A. The heart is a fleshy substance, and might cause some resistance, but I did not make any particular observation: my hurry was to get away; the man being dead, I could be of no further use; I saw he must die in a few minutes. My first inquiry was about the person who killed him.

Cross-examined by Emmet.

I left him alive. I did not stay more than two or three minutes. He appeared to breathe with very great difficulty, like a man who had both the lobes of the lungs perforated. When Mr. Phelps came to my office, I went immediately with him, and found him in that state.

Emmet. When you talk of a man in a passion acquiring strength to impel a weapon, does not that strength consist in the increased velocity?

A. The velocity increases the force.

Q. In order to give that force, must not the velocity be first acquired, and to acquire that, must there not be some space?

A. Undoubtedly.

Q. Then there must have been room for that projectile force to be acquired, before the point met the rib? and if there had been no reach to acquire momentum, would not the rib then resist a mere push, or would it readily be splintered by that action?

The Mayor. Do we understand Mr. Emmet's question to be this? Suppose the instrument met the rib before it had acquired motion, whether it would have so much force?

Witness. I understand the question to be, whether if the first impression is without any range, but merely applied as a push, it would splinter the bone as readily? I think, in that case, the force would be much less effective.

Emmet. Notwithstanding the impediment which the skin and the heart might oppose to its disengaging itself, would not the wedge form of it be an impelling power to incline it to descend, particularly when lubricated by the juices of the body and the blood, and influenced by the weight of this handle?

A. I think its form would aid in throwing it out.

Emmet. The position given to the parties is opposite one to the other. Would it not be hard, face to face—would it not be very difficult, if held thus, (with the blade downwards) to inflict that wound?

A. If it was held that way, I think it would be nearly impossible.

Q. How would you apply it near the backbone, and force it up?

A. It was not near the backbone.

Mr. Van Wyck here stood up, and the doctor taking the weapon for the purpose of illustrating.

Witness. That position given, and the direction of the wound, I do not think it could reach the breastbone.

Q. Is there any way, in standing face to face, that it could be done?

A. If the instrument was held this way, (in the manner of a sword) it would be very possible.

Q. Would there not have been a want of strength from the want of room to draw the blow, as the arm would be at its full extent before the point could enter the body?

A. I think it might be done holding it in that way, if there was strength enough.

Q. By the Mayor. Suppose the back of the adverse party was exposed by stooping, would it not facilitate that direction?

A. If the instrument was held this way, (downwards, the butt next the thumb) it would, no doubt, be more easy.

Q. If the wound was given when a person was falling backwards instead of forwards, would not the direction be altogether different? Would it touch the breastbone?

A. It would be different.

Thirteenth Witness for the Prosecution—Doctor Francis Eloy Berge.

Van Wyck. Suppose a wound given with this instrument, commencing between the ninth and tenth rib, rather towards the back, and then through the apex of the heart till it touched the breast-bone—could it have been done, do you suppose, by the force of an ordinary man ?

A. I think it is possible.

Cross-examined by Emmet.

Q. Would not that depend upon the position of the parties ?

A. Yes, sir, much would depend upon the position of the parties.

Q. If they were directly opposite to each other ?

The Mayor. I now submit my opinion to the good sense of Mr. Emmet. A physician is very properly called in a court of justice to tell the nature and direction of a wound, and its consequences. But to enquire of him how muscular strength may be applied, how men can use their limbs, and touching the position of parties in a fight, is what, I think, the jury will not pay much attention to, being equally capable of judging themselves.

Emmet. The question touching muscular strength was first put by the other side, and therefore I continued the inquiry. I feel the weight of what the court has said, and bow with respect: but the direct examination has been at least as improper as the cross.

The Mayor. You will find that in the case of *Selfridge* this very question frequently came up, and it was decided to be the province of the jury, and that it did not belong to the examination of doctors.

Emmet. Let no conclusion then be drawn from my not asking such questions, and I am content.

The Mayor. It would be very unreasonable that there should, for all such matters of argumentation are subjects of reasoning for the counsel to remark upon, but not for witnesses to argue, who are called merely as experts. (*See Selfridge's Trial, p.* 59, 60, 61.)

Here the Prosecutor rested his case, and Mr. Hoffman opened the case of the Prisoner, as follows:

Hoffman.—May it please the Court.

I do not know, gentlemen of the jury, that ever I was concerned in a cause of deeper interest than the present. With every member of this community, with the prisoner himself, I do most sincerely lament the occasion that brings me here. Mr. Stoughton, a young gentleman of great professional promise, who had every reason to count on length of prosperous days, is unfortunately cut off in the flower of his age, by an untimely death. A father deprived of a child on whom he fondly doated; and a mother of a son, in whom were placed her dearest hopes! Can a case be imagined more calculated to awaken our sympathy ? Turn to the situation of the prisoner: a man in the same grade of society with the deceased;

son equally dear to a parent, a brother to a sister. Like the mother of the unfortunate Stoughton, so is the mother of the unfortunate prisoner; so is that sister, who clings to him with the most devoted affection; and so are the feelings of that brother, whose life has been passed in the service of his country, and who now anxiously watches the progress of this trial. Perhaps a trial thus deeply interesting to the public, to the friends and relatives of the one, and of the other party, has never been brought before a jury of our country. I approach this case with the more diffidence, because we cannot be ignorant of the extreme prejudices which have been incited. God forbid I should charge them to the affectionate parent of Mr. Stoughton. But rumours, newspapers, even pamphlets have all been used and busy to inflame public sentiment, and to create a premature judgment against my unfortunate client; thus prostrating the first principle of our law, by making the presumption of guilt to precede the investigation of a judicial tribunal. Is there a man who hears me, and who did not yield his judgment captive to the first rumours, and believe that a wilful assassination had been committed? and has not the testimony even for the prosecution silenced such rumours forever? The conduct of the prisoner, as well before as immediately after the conflict, evinces his ignorance even of the existence of a wound; and you will find in his subsequent conduct, confirmation strong of his entire innocence.

Indignant at the charge, he willingly surrenders himself to the judgment of the law, for he would rather suffer death, than live under the aspersion of being a deliberate murderer or an assassin. He felt the full force of his own misfortune, and wept in his heart at the fatal catastrophe. He knew his own innocence, and he at once decided, to encounter public prejudice at the hazard of character, imprisonment, nay, life itself.

Gentlemen, you are not only to ascertain facts, but it is your duty to understand the principles of criminal law applicable to this transaction; for, in every criminal case, the jury are emphatically judges of law as well as of fact. It is the duty of the court to advise you as to law, but the decision must still be your own, according to your best judgments and the dictates of your own consciences.

Hereafter, I shall offer to your consideration the law on the subject, but I first call your attention to a brief review of the testimony already given for the prosecution. It must have created some surprise and much doubt in your minds, to perceive that all the witnesses materially differ in their relation; and yet, upon proof so contradictory, you are to find the deceased came by his death *in the manner* charged in the indictment; that is to say, *that Mr. Goodwin did stab, penetrate, and thrust the dagger, which he held in his hand, into the body of Mr. Stoughton, and so did kill him.* Admitting all that has been testified, can you pronounce that Mr. Stoughton came to his death in the *manner charged?* If not, the prisoner is entitled to acquittal. Suppose the sword became entangled in the clothes of the deceased, or was dropped by the prisoner, and in either case that Mr. Stoughton fell upon it, the indictment is unsupported. I said,

that I should call your attention to a brief review of the testimony, because it will assist you the better to understand and apply the principles of law, as I shall hereafter urge them.

The first witness was Mr. Clark, a gentleman of strict probity, and careful and anxious to be accurate in his testimony. He was near the parties, and states, that he distinctly saw the blow which occasioned the fall: and no other witnesses except two, who were at a distance on the opposite side of Broadway, have pretended to have seen that blow. Mr. Clark states, that it was the last blow previous to the fainting of Mr. Stoughton, and that it was given with the right hand, without any weapon being then in it; and that no other blow was given by Mr. Goodwin while the deceased was on the ground, after he rose, nor when he fainted. Unless this positive testimony is rejected, we must believe that this blow was given after the sword was dropped by Mr. Goodwin. It is impossible that the blow could be given, and the sword thrust at one and the same instant of time. Mr. Clark was nearer than any other witness, and had the best opportunity to see all the circumstances.

When the gentlemen on the opposite side of Broadway spoke of the blows inflicted upon Mr. Stoughton while on the ground, they were certainly mistaken. Mr. Clark was near him—saw him fall—advanced directly towards him—saw no weapon used, nor blows given when he was down. It is owing to that error and mistake so naturally to be expected in human testimony, on occasions like the present, and in moments of great surprise, that we must impute the contradiction in the statement of the witnesses. I admit that two of the customhouse clerks say, they saw the prisoner strike the deceased while lying on the ground, several times, with the handle of the swordcane. Mr. Ball, another witness, thinks it was only with the hand: but if we believe Mr. Clark, not only was no blow given while the deceased was on the pavement, but none could have been given with the cane, as is testified by two witnesses, because at that time Mr. Goodwin had not a cane in his hand. The testimony of Mr. Clark too, in every essential point, is corroborated by that of Mr. Weed. He was standing on the platform of his store door; saw the cane pointed towards Mr. Stoughton; saw Mr. Goodwin proceeding down, and Mr. Stoughton up Broadway. After passing each other at some distance, saw Mr. Stoughton return, and the first blow given by him was returned by the prisoner with the small end of his cane: the scabbard flew off, and the witness thinks that blow knocked Mr. Stoughton down. The witness in this is mistaken; and it will be recollected, that he stated that a crowd collected, and that persons were between him and the deceased; and that he saw no other blows, although near half a minute elapsed before Mr. Stoughton fell. Now if the cane had knocked him down, he would have fallen instantly. Mr. Clark says the blow which felled Mr. Stoughton was given by the hand; of course there must have been intermediate blows between the stroke with the cane spoken of by Mr. Weed, and the blow with

the hand testified to by Mr. Clark; and all the other witnesses declare that several and mutual blows passed between the parties.

But putting the testimony of Mr. Clark and Mr. Weed out of the question, how stands the testimony of the other witnesses? Mr. Haycock saw a scuffle, two gentlemen fighting, mutual blows passing, and whilst Mr. Stoughton was down Mr. Goodwin struck him several times on the head with the but end of the cane. This is a palpable error. Besides the positive testimony, the intrinsic evidence of the case proves it so. The prisoner could not strike such blows with so great force, nor could any human being receive such blows with the but end of *that* cane, on the face or on the head, and yet no mark or contusion appear. And we find that when the deceased was examined, the effect of such blows was not discovered, and no bruises or contusions appeared on the face or on the head. In the very nature of things, therefore, it is impossible that such blows could have been given.

The witnesses then who have thus testified, are mistaken. They do not mean to deceive or misrepresent; but they were under a delusion of mind, occasioned by the agitation of the moment, and their imagination has given body and shape to circumstances which never existed, but which they honestly believe to have taken place. And so it will always be in affrays like the present, and in trials of this nature. Errors, mistakes, and contradictions, will ever occur.

Look at the case of Mr. Selfridge—the most remarkable one in the annals of our criminal jurisprudence.

He went armed, at noonday, in the public streets. He used a pistol to kill Mr. Austin, who had assaulted him, or was approaching so to do—yet that transaction, thus exposed to public view, was stated by the witnesses in the most extraordinary manner. Conjecture usurped the place of fact; and, amid the conflict of oaths, the honest juror was left without a resting place for his judgment. Men of as high honour as any in the town of Boston, swear positively to circumstances in direct contradiction to one another. In such a chaos of proof, there was no testimony on the accuracy of which the jury would safely repose their consciences: they were left to the internal evidence of the transaction to find out the truth. The jury in that case knew, that a public prosecutor must fasten the charge upon the accused, by positive and certain proof; and they wisely and justly concluded, that it was no reason, because Austin had lost his life, that they should, of necessity, deprive Selfridge of his liberty and character. Could we indeed, in this case, restore the dead to life, by inflicting punishment on the survivor, there would be a motive for conviction. Would to God your verdict of guilty would create this miracle! Then would the unfortunate prisoner submit without a murmur; nay, he would rejoice at his own condition, and willingly suffer the punishment, however severe, inflicted by the laws of his country for the crime of manslaughter.

I assume then the fact, and with confidence, that, at the time of the blow which felled the deceased, the prisoner had no weapon in his hand: and it is not pretended, nor can it be, that before Mr. Stoughton thus fell, he received the mortal wound: and it is certain, that after he rose, and before he sunk to rise no more, the distance between the deceased and the prisoner rendered it impossible for the latter to give the wound, even if the sword had been in his hand.

To proceed—Mr. Weed says, after Mr. Stoughton fell, he saw both parts of the cane on the ground; and after Mr. Stoughton had fainted, the witness saw the blade part in the hands of the prisoner. And Mr. Clark establishes, as I have before shown, that it was not in the hand of the prisoner when the blow was given, nor until after the fainting.

How came he in possession of it after the contest? The answer is obvious—it was picked up by some bystander and handed to him. He looks at it with surprise, but manifests no symptoms of consciousness that he had, in any manner, used it. If he had felt any self-accusation of having used it, he would have retreated without receiving it, or have concealed from every accusing eye, its size, its shape, and its deadly power. But he seeks no concealment—he leaves it in the store of Mr. Weed, or delivers it to some person near him; and its very production in this court, proceeding from his own voluntary act, is the strongest proof of his own ignorance of the cause of this fatal accident, and disproves every presumption of design or of intentional guilt.

After the delivery of the dagger, what was his conduct? Does he fly precipitately? No—He deliberately seeks for his hat, which had been knocked off in the scuffle, as a man unconscious of having mortally wounded a fellow-being, and calmly walks off with his friend. Firm and confiding in the innocence of his own heart, and even ignorant of any serious injury sustained by Mr. Stoughton, he leaves behind him this very instrument of death, as testimony against him on this day's trial. Let us proceed a little farther into the testimony: The more witnesses the prosecutor produces, the greater will appear the contradictions in the evidence. The orangeman agrees with Mr. Clark, as to the fall near the curbstone, but contradicts him in stating, that blows were struck when the deceased was on the ground. But the most palpable and manifest contradiction is, that he states all the blows to have been on the part of Mr. Goodwin, and not a single one by Mr. Stoughton—that he did not offer to strike, and was the whole time retreating and warding off the blows. He stands alone. Every other witness testifies to the contrary. The hat of Mr. Goodwin was knocked off by a blow from the deceased, and a respectable witness has sworn, that it was difficult to say who had the best of the battle—Is he not correct?

Mr. Stoughton, a young man of great activity, in stature and in strength equal to his adversary, after passing him, returns, pursues him, and commences the attack, by giving the first blow. What

confidence can there be placed on the accuracy of a witness who swears Mr. Stoughton never struck a blow, and that the violence was all on the part of Mr. Goodwin? It is impossible that the relation of this witness can be true.

In what way then did this misfortune happen? I call it misfortune, or accident, for the testimony already produced, leaves no doubt that the prisoner *never plunged* the sword into the body of Mr. Stoughton; and for the purpose of the defence, it is immaterial how otherwise the wound was received. That the deceased fell on the sword, is almost morally certain, from the testimony of Dr. Mott, who swears that in the situation of the parties, he judged it nearly impossible the wound could have been given by Mr. Goodwin; and from its direction and course he concluded Mr. Stoughton must have fallen on the weapon. Dr. Mott's character is known; he ranks at the head of his profession as a surgeon; his talents and judgment are confessed by all, and his integrity and candor are questioned by none.

I have thus, gentlemen, attempted fairly and candidly to present to you the substance and character of the testimony already given, and my view of it will be greatly strengthened by adverting for a few minutes to the situation of the parties from their first meeting until Mr. Goodwin freely surrendered himself to the officers of our police. In no part of his conduct will you find him suffering under a sense of guilt, or apprehension of punishment, or fearing a full and complete investigation. He even courts a public trial. Can it be true, therefore, that he sought a quarrel, or began an affray, as has been represented, in our public streets?

Of the causes or merits of the former disagreement between the parties, I say nothing. They are not evidence on this trial, and it will not be permitted that we enter into them; our attention must be confined to the transactions of the day. The parties passed each other, and it is clear, that whatever then took place, did not provoke the immediate resentment or excite the anger of Mr. Stoughton: he crossed a whole street before he returned and assaulted Mr. Goodwin. It was not then the pointing of the cane that called forth his wrath; if it were so, the moment of the insult given, would be the moment of the insult resented. Mr. Stoughton, therefore, had not the excuse of acting upon the provocation pretended.. Suppose one of you had been insulted by contemptuous language or other indignity, would you have pursued your way step after step, yard after yard, before you noticed the offence? No, gentlemen: such insult, by every law and principle of our nature, if noticed at all, would produce sudden retaliation; and therefore I am constrained to say, it was the bitterness of previous quarrel that occurred to the mind of Mr. Stoughton, aroused his resentment, and occasioned his return and deliberate attack. The opportunity seemed to invite it, an excuse was given, and he gladly embraced it. After they had passed, Mr. Goodwin proceeds directly towards his place of residence, and without looking back as if wishing or expecting an attack. Mr. Stoughton returns, and

commences the affray by a blow. Can it then be said, as it has been said, published, and circulated, for the purpose of pressing down the prisoner by a load of prejudice, that he commenced the affray? No. Stoughton passed on—Stoughton returned—Stoughton began the attack, and his was the first unlawful act.

Suppose death had not ensued, and you were now trying an action against Mr. Goodwin for an assault and battery. Upon the evidence now produced, his defence must have been sustained, and his whole conduct would have been justifiable, as long as he confined himself to repel the attack blow for blow; and the use of his cane would not have rendered it less so. But mark me—I am not justifying the intentional use of the weapon; for if he did stab with it, although death did not ensue, then I admit he pursued the combat for the purpose of deadly revenge. But fortunately for his own reflections, the tranquillity of his own heart, and his just acquittal at this time, no such motive existed, and the charge of stabbing is baseless and untrue.

I shall now, gentlemen, call your attention to the law. I know that to examine law cases and authorities, is ever irksome to a jury: yet, give me a patient hearing, and I do not despair of imparting to you a clear and distinct knowledge of the principles of criminal law, applicable to the interesting question you now have to decide. I have already stated, that as far as the blows were returned, they were not unlawful; and I assert, if death ensued in a way not connected with the act of Mr. Goodwin, nor with his intention, it was an accident, and an homicide by misadventure, for which he is in no wise responsible.

You are trying Mr. Goodwin on an indictment for manslaughter, and it is your duty to understand the nature of this crime, to enable you justly to decide on his guilt or innocence.

Perhaps in no trial in England or this country, has the learning upon homicide been displayed with more ability than in the case of Mr. Selfridge, already alluded to; a case in many respects resembling, and some of its striking features similar, to the present one. There too parents wept over the untimely end of a promising son, public sympathy was equally great, prejudices were strong and extensive, and like the present case, were excited by the aid of partial and illiberal publications; crowds assembled during the trial, but the jury dared to acquit Mr. Selfridge. All outdoor rumours were forgotten in the jury-box; no former impressions were suffered there to prevail and to bias the judgments of the jury; they heard the testimony calmly, and judged the transaction as it then appeared; not as calumny and passion, or even honest error and mistake had before represented it. Their verdict was the triumph of justice over public opinion hastily formed; it was the dispassionate judgment of the mind, uncontrolled by the influence and clamours of ignorance and passion; unmoved by the heartfelt commiseration for the bereaved parents, relatives and friends, of the deceased.

What is the crime of *manslaughter?* It is not every killing of a human being by the act of man that incurs the guilt of this crime. Nor am I prepared to admit as an universal principle of our law, that if death ensues by accident and unintentionally, from the commission of a mere civil trespass, however slight and excusable, such death must be adjudged manslaughter. I am aware that many authorities in the English courts seem to carry the doctrine of homicide to this severe extent. In this state we ought to adopt this principle with great care and discrimination, and with such merciful qualifications, as the different degrees of punishment in the two countries justly require. In England, the crime of manslaughter, in its mitigated form, carries with it no infamy. Its punishment is almost nominal—seldom more than a fine of a few shillings, followed by a pardon. Even in its most aggravated character, when it approaches more to the crime of murder, the punishment is fine, and not exceeding a year's imprisonment. Hence it is, that the tribunals of England have always been inclined to consider every species of homicide, below wilful murder, as manslaughter. The same inducements to fritter away the solid distinction between active guilt and an unfortunate accident, exist not with us. Here the punishment must be at least three years' imprisonment in the state prison: and whatever may have been the cause, however pure the heart and unintentional the act, there can be no graduation of the offence: it must be considered as a crime of a heinous dye, and the unfortunate victim of accident and chance must be ruined, degraded, and rendered infamous. If we adopt, in the whole extent, the English doctrine of manslaughter, in the language of Mr. Justice Foster, "we may even aggravate the loss of a brother, a parent, a child, or wife." "Because," says he, treating of incautious conduct occasioning death, "accidents of this lamentable kind may be the lot of the wisest and best of mankind, and most commonly fall out among the nearest friends and relatives." And the same humane judge admits the rigour of the English law "to border upon injustice, in cases where the heart is free from guilt."

Let me state a case, well calculated to impress your minds with abhorrence at the cruelty of a verdict, which in this state would recognise the law of England on the subject of manslaughter. A husband finds a man in the act of adultery with his wife, and in the first transport of passion, kills him. In England, it would be manslaughter, and a few shillings would be the punishment. I mistake the character of an American jury, if for this violation of all moral principle and duty, if for an offence so grievous in the sight of God and man—and if for an injury so lasting and irreparable, to the happiness and peace of an individual—I say, I mistake the feelings and character of you, gentlemen of the jury, if, in such a case, you would adopt the English law, and by your verdict, find the killing of the adulterer, a crime. Would you, in such a case, condemn to the state prison a husband who slew the robber, caught in the very act of prostituting, and bearing away the richest prize of

omestic happiness, the chastity of a wife. It cannot be. Such killing, in the judgment of heaven and of man, would be excusable homicide.

I shall now, gentlemen, examine the English authorities on this subject, and admitting their full force and application, I assert with confidence, that, governed even by these, the prisoner is to be acquitted.

First, I remark as an universal proposition, and supported by every law case, that the blow, or other act causing the death of a person, must have been a voluntary act. I do not intend to assert that the act must be intended to cause death, but that the act itself, which however unexpectedly did cause the homicide, must have proceeded from the will and design of the person committing it: as, if two men engage in a fight, and, in the moment of heat and passion, a blow is given which proves fatal. It was not the intent of the party to kill; but yet, he intended to give the blow, the effects of which, unfortunately, proved mortal. Again, a person shoots at the poultry of his neighbour, the ball glances and kills a bystander; the firing was a voluntary act—but it was an unlawful act; and, therefore, the accidental killing was adjudged manslaughter.

Now, before you can apply the English law in its greatest strictness to the present case, you are to be satisfied that Mr. Goodwin did actually inflict the wound. I admit, that it is not necessary he should have meditated the death of Mr. Stoughton: but I repeat, that to constitute the crime charged in the indictment, the prisoner must be found to have *used* the dagger, and in its *voluntary* use to have given the mortal stab.

The counsel then read to the jury the definition of manslaughter, by Chief Justice Parsons. (*Selfridge's Trial, p.* 6. *Ibid. Charge of Court, fol.* 158.) He also cited, 4 *Black. Com.* 182-11. 2 *Chitty's Criminal Law*, 729. *Foster's C. L.* 261. 1 *East's C. L.* 244. *Taylor's case*, 5 *Burrows*, 2793. *Snow's case*, 1 *Leach*, 176. And Sir *John Chichester's case*, from *Foster*. On all these authorities he commented at length, and enforced his first position, that in all of them there was a *wilful* act on the part of the killer, and which, although unintentional, produced death. He applied the principle of these cases by pressing the fact, that there was no evidence that the prisoner ever gave the blow with the sword; nay, the testimony rightly considered is, that he had it not in his hand when the wound was received. Suppose he had, yet, if not directed by him, he must be acquitted. (1 *East*, p. 6. 269.) "Though the weapons be of a dangerous nature, yet if they be not directed by the persons using them against each other, and *so* no danger to be reasonably apprehended, if death *casually* ensue it is but misadventure." "So, if A assaults B, who flies to the wall, or falls holding a sword, knife, or pike, in his hand; A runs violently, or *falls* upon the knife of B without any thrust or stroke *offered* at him by B and dies; this is death per *infortunium*." (1 *Hale*, 480.) Again, in the same book, page 493, "B having a pitchfork in his hand, A assaults B so fiercely that he runs upon the pitchfork of B and dies, B offering no thrust at

all against A, it seems B forfeits no goods, because it was the act of A himself."

Gentlemen, I have read these cases to you, that you may extract from them some principles strongly applicable to the facts of the present case, even if you should, from the discordant evidence offered, be able to infer or collect, that at the time of the wound received, the prisoner had the sword in his hand. Understand me, gentlemen, for it is my object to address you candidly and frankly, and not to attempt to mislead your judgments, or to press any doctrine of law, beyond its fair and legitimate application. If, therefore, the deceased did not commence the affray by the first personal violence, or if the prisoner was not justifiable in resisting such violence, then the principles of those authorities do not apply; but if the unlawful act commenced with the deceased, and death *casually* ensued, without *intentional* use of the weapon, it is but misadventure; or if the prisoner held it in his hand passively, and without any thrust on his part, and the deceased, by closing in, or otherwise presses or falls on it, comes to his death, it is still a casualty or misadventure. Gentlemen, I have finished my remarks on the law. I have not entered into the nice distinctions which prevail in England between the different kinds of excusable and justifiable homicide, because they are inapplicable to the criminal code of our country. Excusable homicide, in England, is followed by forfeiture. We have no forfeiture here, and the distinctions in the English authorities, on this branch of the subject, serve to bewilder, and not to enlighten us. My object has been to confine my remarks to the crime now under consideration, that your attention may be fixed to a single point, and your minds not perplexed by a display of learning, which belongs not to the immediate subject of your investigation.

Gentlemen, we shall now produce the testimony on our part; and if you have any doubts remaining, they will be removed. And no man, who attends this trial, will hereafter regard the unfortunate prisoner without feelings of sympathy and commiseration. Every prejudice will be dissipated, and every heart will acquit him from deliberate and wilful crime. We shall prove to you his proud conduct at Elizabethtown, his voluntary surrender, his boldness to encounter the force and influence of public clamour and private resentment; relying on the consciousness of his own heart, which felt no guilt; and feelingly alive to his own character and reputation, he would not, by flight, confirm the calumny of his being an assassin or murderer.

He sought, therefore, this day's investigation, and threw himself on the decision of a jury of his country, as the protecting shield of his reputation and innocence, in his future walks through life. To your magnanimity, justice and firmness, he then appeals: by the ties of filial attachment, which bind him in reverence to an almost broken-hearted parent, who mourns in deep affliction over the event, which, at this hour, darkens the destiny of her son: by the fraternal love which unites him to a sister, whose sighs and sorrows

have reached him from afar, and whose only hope of happiness hangs on the restoration of this brother, with a character purified and acquitted of the foul charge of assassination, he makes this appeal: not to your sympathies, but he conjures you to forget every former prepossession, and resisting public clamour, public prejudice, and whatever may be the voice and opinion of the multitude, that you will dare to do your duty, and to render a verdict of acquittal.

In doing so, I am not asking you to suppress the best feelings of our nature. Let us weep for the death of Stoughton. I knew him well. Let us mingle our tears with the tears of his deeply afflicted parents. And whilst with you, and with me, the prisoner sheds a tear over the untimely and unforeseen end of the son of their promise and their hopes—whilst with poignant regret he will ever remember the disaster of that day, and deplore the misfortune of the aged and comfortless parents—still he claims his acquittal of being the willing instrument of death and misery.

He calls upon you to restore him with untarnished reputation to the embraces of a widowed parent. He calls upon you to wipe away the tears of an affectionate and afflicted sister; and to give him up to *that* brother, who has been to him a companion in imprisonment, and is now his anxious attendant during the progress of this trial. He boldly deposits in your safe keeping his innocence, his freedom, and his future fate.

EVIDENCE ON BEHALF OF THE PRISONER.

First Witness for the Prisoner—Hosier Wilder.

EXAMINED BY JAMES A. HAMILTON.

Witness. I was walking up Broadway on the eastern side of the street; and after I had got nearly to the corner of Maiden-lane; in casting my eye across the street, I saw two persons on the pavement. The first thing that struck my view was, the one over, or on the top of the other; Mr. Stoughton was lying on his back. I did not then know either party. Mr. Goodwin was in the act of striking him when I first saw them, and repeated his blows two or three times with his hands, whilst Mr. Stoughton was on his back, striking with both hands, first one and then the other. I could not distinguish whether the hands were open or shut. On observing this, I immediately ran between them: my intention was to part them. It was the natural impulse of my mind on seeing an affray, to endeavour to make peace. I approached very near them, say within a yard or two, or perhaps half the breadth of the street: when some gentlemen who had got there sooner, perhaps two or three, were nearer than me. I did not know these gentlemen at the time. I then observed one gentleman take hold of Mr. Goodwin, who was then in an inclining posture over Mr. Stoughton, whether on his feet or on his knees I could not see. Some gentleman then took hold of him and said, you seem to be a gentleman, I am surprised to see you in that situation; or, perhaps, not quite so many words.

He took hold of Mr. Goodwin, and he rose from over Mr. Stoughton, and got upon his feet and stepped back. At the same instant, either this gentleman or another, took hold of Mr. Stoughton and lifted him up, by means of his own strength added to that of the person who helped him. He rose on his feet and stood against a person, leaning on his shoulder a moment or two; he then fell back, and I perceived an instantaneous change in his countenance, and a cast in his eye. Somebody said, a doctor should be sent for, and that he should be bled; I think it was Mr. Clark, or the same gentleman that raised him up; it might have been another. I had my eye constantly upon him whilst this was passing. In a very short time he settled down like one crippled, about half way down to the pavement, from the shoulder of the person that he had leaned on. He was then taken up and carried to an adjacent store. After Mr. Goodwin was taken off him, or rose from over him, three or four, or half a dozen people, had come from every direction. Mr. Goodwin stood and looked for his hat. When he was taken off, he had nothing on his head.

Hoffman. Did you see the weapon, or the cane, on the ground?

A. I saw it afterwards, when Mr. Goodwin was looking for his hat. I recollect seeing the weapon somewhere, but whether in the hands of any person, or before it was picked up from the pavement, I cannot determine. From the time I saw him till the affray was over, I had a full and distinct view, and there was nothing to intercept my sight. Whether the blows were with the open or closed hands I cannot say. They seemed to be always at the head. They were repeated quick. If I can believe my own senses, I think I should have seen the weapon, or any thing he could have in his hands, from the time I first saw him.

Cross-examined by Wells.

Q. You say the first you saw of these parties, was one over the other. Was the prisoner on the ground?

A. I cannot say whether he was on his feet, or leaning on his knees. The first motion I perceived was the giving of those blows.

Q. Might not he have that dagger in his hand, and you not see it, supposing he held it in that manner? (showing.)

A. It appears to me next to impossible. I took it to be an ordinary affray, and thought it of little consequence.

Q. Then not considering it a serious affair, Mr. Goodwin might have had that in his hand, or a stone, for aught you knew?

A. I saw the motions, and could see quite plain across. I was a little below Maiden-lane, when I first saw them.

Q. Was there any blow after the prisoner was raised from Mr. Stoughton?

A. No, sir. They were not in such a position that they could come together. They were not near each other.

Q. Did you see Mr. Stoughton when he fell?

A. No. The first thing I saw was when he was lying on his back.

The Mayor. I wish the counsel would interrogate the witness so as to identify the part of the street where this happened.

Witness. I should say that probably Mr. Stoughton's body lay from 10 to 12 feet from the corner of the curbstone; his feet were next to the curbstone. He lay obliquely, or diagonally, his feet pointing to the southwest corner, or angle of the curbstone.

Q. Do you know who those persons were that came up to them?

A. I did not know a single person on the ground. I saw Mr. Wier a few steps from me. I think he was ahead of me. They were all strangers to me that came first on the ground.

The Mayor. You say there were one or two persons before you—did Mr. Wier cross over before you?

A. I think there was not much difference. He may have been a little before me.

Second witness for the Prisoner—Col. James Warner, Police Justice.

Witness. At the request of the mayor and general Bogardus, I went over to Elizabethtown in pursuit of Mr. Goodwin, on the evening of the 21st of December last. I took with me two police officers; Mr. Hays, the high constable, and Mr. Raymond. We crossed the river in a rowboat, got a carriage at Jersey, and drove rapidly to the Point, to ascertain if he was there, and inquired if such a gentleman had crossed. They told me that gentlemen of the description had crossed. I next inquired whether any measures had been taken to obtain a carriage. They told me not, and that all the gentlemen had gone up to the town. I inquired of the person who had gone down with him, (the proprietor I think he was) and he informed me the passengers were all at the same house. Finding they were all gone to the same public house, (Rivers's) we went directly there. When we came to the stoop, as Mr. Raymond knew him, I desired him to look into the window, which he did, and said he was not there. I then said I must see the landlord, to ask if all the passengers were there. Mr. Goodwin was in the bar-room smoking a segar, or had one in his hand. Mr. Raymond addressed him; for he was to speak to him, that I might by that means know which of the gentlemen was he. Mr. Raymond asked him how he did, and told him he was sorry for what had happened. Mr. Goodwin answered, how do you do, Mr. Raymond? how is Mr. Stoughton? I then told him I was sorry to inform him he was dead, and that I was come from New-York, to take him to answer for the act of killing him, or some such words. He expressed his sorrow, and observed that he was ready to go; that he never would fly from the laws of his country; that he had not come there to avoid the charge; that he had no idea of such a thing taking place, and declared his willingness to go with me. He came out with me, and then expressed a desire to speak to a gentleman who was in the room I had first looked into. I told him that he might. He then opened the door, and called a gentleman by the name of Judge Butler. The gentleman came out into the entry. He

observed to him that he was arrested, or taken, and had to go back to New-York. The gentleman then addressed himself to me, and inquired by what authority I took him. I answered, by no written authority. He observed that the authority of the mayor did not reach there. I told him I knew that: that it was for Mr. Goodwin to say whether he would go or not. He replied that he was ready to go, and would submit. Mr. Butler approved that course, and said it was very proper. The carriage was then standing at the door. He jumped in, and we drove on to New-York. The prisoner expressed his wish to be taken to the mayor, immediately on his arrival; and I told him if the mayor was up, he certainly should.

Cross-examined by Hoffman.

Q Did he say, you have no right to take me, but I will go?

A. After Mr. Butler spoke about the authority of the mayor, he mentioned that he would not object.

Q. You admitted you had no right to take him?

A. I said I had no written authority. But I was myself determined to have made a hue-and-cry, though I did not tell him that. He was very courteous and complying, and there was no occasion. He was taken to the mayor that night, and committed to the Bridewell.

Q. Do you know who Mr. Butler is?

A. I have heard he was one of the members of congress for Louisiana—he was called Judge Butler.

Third Witness for the Prisoner—Jacob Hays.

Witness. I can say nothing but what Mr. Warner has said. Somebody asked what authority we had, immediately on our going in; and the prisoner at once said he would go.

Emmet. I find myself under the necessity of stating, that Mr. Hoffman, who has charge of the testimony of the prisoner, is extremely indisposed. I shall request, as a favour, that the court adjourn. It is now nearly five o'clock, and perhaps it would not be, at any rate, a very improper time to adjourn.

The Mayor. I feel very much for this jury. It is hard to keep so many citizens from their families. They are entitled to be consulted on this point. His honour further stated that he had received a note for one of the jurors: that it only regarded his family affairs, and he presumed it could not be any prejudice to either of the parties. The counsel on both sides consented, and it was given to the juror.

And then one of the jurors asked on behalf of himself and his fellow-jurors, whether they might not be allowed to communicate with their clerks. Which the mayor said could not be permitted, unless it were in open court.

The oppressive heat of the court from the continual crowd which had so long filled it, had exhausted all concerned, and the jurors asked whether they might not, during the recess of the court, be

indulged to walk in the Park, adjoining the Hall, to take the fresh air; which, after some deliberation, the court seemed disposed to comply with. But the sheriff observing that he could give the jurors the same recreation, and a very agreeable walk on the top of the building, that was thought more suitable. The mayor also pointed out the governor's gallery, where they might have as much air and exercise as their health required, and be as sequestered as in the jury room.

Then Mr. Crawbuck, one of the jurors, asked for permission to communicate with one of his sons, or with a clerk—to which the mayor answered, that it must only be in court, and that the court would now wait, if it was necessary, to give him time to come, or that he might come to-morrow morning. And the court then adjourned till the following morning, at the usual hour of eleven o'clock.

THIRD DAY.—THURSDAY, MARCH 16th.

At 11 o'clock A. M. the Court met.

PRESENT AS BEFORE.

The court being met, the jury was called over, and each answered to his name. The mayor told the petit jurors not empanelled in this cause, that it appeared quite unlikely that this trial should be finished before to-morrow. And Saturday being appropriated to the making up and pronouncing the sentences of the convicts, and no jury day, they were therefore discharged for the term.

Fourteenth witness for the prosecution—Churchill C. Cambreleng.

EXAMINED BY GRIFFIN.

Q. Were you in company with Mr. Goodwin on the 21st of December last?

A. I was, sir.

Q. At what hour did you and he come together?

A. About three o'clock.

Q. Where did you first come together?

A. At the City Hotel.

Q. Where did you then go?

A. We walked up Broadway as far as the Church, and then returned.

Q. Upon your return did you meet Mr. Stoughton?

A. We did.

Q. Where?

A. Nearly at King and Mead's store, on the northwest side of Broadway, next Courtlandt-street.

Q. How long before you passed him did you see him coming?

A. About thirty or forty seconds.

Q. Did you make any observation to Mr. Goodwin?

A. I think I said, there is your friend coming, or something of that kind.

Q. Did Mr. Goodwin make any reply ?

A. He said nothing at all. We then walked on to the northwest corner of Courtlandt-street and Broadway, opposite to King and Mead's store. When we approached within about six paces of Mr. Stoughton, Mr. Goodwin and he being in front of each other, Mr. Goodwin pointed at him with his cane, and said, there is a coward and a scoundrel, or such words, I cannot exactly say, pointing his cane as if indicating that he was the man. This was on the side-walk, on the southwest corner.

Q. What occurred when you passed Mr. Stoughton ?

A. Mr. Stoughton passed on without saying any thing ; they looked at each other ; Mr. Stoughton passed on about two paces and then turned quickly round.—I think I should get through more regularly, if the gentlemen would allow me to tell the story as it happened.

Griffin. I wish to direct your attention to this : I want to know whether Mr. Goodwin repeated these words as he passed him ?

A. He merely pointed and repeated the words as he passed.

Q. Be good enough, sir, to mention what occurred afterwards.

A. After Mr. Stoughton passed on a few paces, he turned partly round. Mr. Goodwin turned facing him. Apprehending an affray, I pulled Mr. Goodwin by the arm, and advised him to go on, which he did readily. We crossed the head of Courtlandt-street, from the northwest to the southwest corner, and I supposed that Mr. Stoughton had continued his walk. When we had reached the southwest corner, Mr. Stoughton, who had followed, came up and accosted Mr. Goodwin. Mr. Goodwin turned quickly and answered. I cannot precisely repeat his words, I think they were these : " Will you repeat what you said ?" The answer was, I will, sir : that at least was the import. The question and answer were very short and quick. It was next to impossible for a bystander to understand them. Mr. Stoughton struck him, and after that blow, Mr. Goodwin struck Mr. Stoughton with his cane, holding the but end of it in his hand : the blow followed immediately. Mr. Stoughton struck Mr. Goodwin near the left shoulder, pretty high up on the breast ; I could not tell exactly, Mr. Goodwin being at that time turned round. The blow of Mr. Stoughton was with his fist. I saw the motion of the hand, but could not see distinctly, as Mr. Goodwin's back was to me, and he was between me and Mr. Stoughton. (The cane was now shown to the witness.) This is, I presume, the same. In striking the blow with this cane, the dagger flew partly out of the sheath. The attention of both parties seemed directed toward that part of the blade which was exposed. Mr. Goodwin, however, seized the dagger by the handle, and put the blade in his right hand. The first stroke was with the but of the cane. In doing that the sheath was off it, about so far, (showing a few inches) Mr. Goodwin then seized the blade, and in that manner followed up his blow.

The Mayor. I should like to know precisely where the parties were at this stage of the transaction ?

A. At the moment the blow was given with the cane, both parties were on the sidewalk. It appeared to me that Mr. Stoughton, on retreating, placed one foot upon the pavement of the cartway. The battle between them was quick and sudden. I should suppose three or four blows were given on each side, and I think they retreated (one retreating and the other advancing) about eight paces across, but not quite as far as the middle of Courtlandt-street, and rather into Broadway. Mr. Goodwin held the sword close by the handle, which I think took from it part of the force and impulse it would have had if held more at length.

Q. When you say the one was retreating and the other advancing, you mean that Mr. Stoughton was retreating and Mr. Goodwin advancing?

A. I do.

Q. Where were you situated at the time of that retreat?

A. I was on the sidewalk.

Q. Was the prisoner's back or face towards you?

A. I could see the right arm of Mr. Goodwin, and the left of Mr. Stoughton. I could see the blows that were given, being high, in the way they were fighting. Mr. Weed was then standing not far from us, on his own stoop.

Q. Who was the first person that came to interfere between the combatants?

A. I think Mr. Clark and myself arrived about the same time. He came from the northeast side, and I of course from the southwest. Mr. Stoughton had fallen before either of us came up. I cannot tell whether he fell from the blow, or tripped in retreating, or what produced his fall; for the further they went from me, the less I could see. Another reason was, that each party had on one of those fashionable surtout coats, with large capes, so that it was difficult for me to see what was passing between them at the moment.

Q. Please to go on sir, and mention what else took place.

A. Mr. Clark called out from the other corner, and we went up o them. I was behind Mr. Goodwin, and took hold of him, and parated them.

Q. What was their precise situation at that time when you came them?

A. I think Mr. Stoughton was lying on the cartway. Mr. Goodin had fallen nearly down upon him, but not so far as to lose his lance, but as near as he could well be, without being on the body the other. It is difficult to describe their situation with exactness.

Q. When Mr. Clark came up to separate them?

A. There was another gentleman, whom I have supposed was . Clark, but who I now believe was Mr. M'Williams.

Q. What was the first act of Mr. Clark—who first took hold of parties?

A. The back of Mr. Goodwin was to me, and prevented my g him.

Q. Be so good then to state, sir, what next occurred.

A. The parties were separated, Mr. Stoughton was raised; I think he got up with very little assistance from Mr. M'Williams. They stood looking at each other like two persons that had been engaged, and were ready to begin the battle again, if we would let them. While they were so standing, three or four other persons came up. In about half a minute Mr. Stoughton rested his arm or hand upon the shoulder of Mr. M'Williams, I thought till lately it was Mr. Clark; and gradually reclined his head upon his hand, resting it upon Mr. M'Williams' shoulder: and, as I thought at the time, fainted away.

Q. Was there any explanation made before Mr. Phelps at the time?

A. Mr. Phelps came up just before he fainted, and looked him in the face, and said: "this is a dead man."

Q. Did Mr. Goodwin leave the ground then, and what passed?

A. Mr. Stoughton, when he swooned, was supported by those that were near him, so that he did not fall at all: and he was taken into a neighbouring store and the door locked. This might probably have occupied a minute. The door was locked almost immediately, to prevent the crowd from rushing in and taking the goods in the drygoods store. Mr. Goodwin observed to me, that he had lost his hat, but had got Mr. Stoughton's; I told him he had better keep that till he had found his own: that probably the person who had that, had exchanged.

Q. Where did he go then?

A. We walked together down Broadway, leisurely, as we had been walking before.

Wells. What was your conversation then?

A. Mr. Goodwin asked me if I thought he had better leave the city. I told him no, it was unnecessary; that Mr. Stoughton had fainted, and would undoubtedly recover. Mr. Goodwin then reminded me of the expression of Mr. Phelps, "That is a dead man." I then told him that, perhaps, he had better quit the city till he had ascertained whether he recovered or not.

Q. Where did you part with him?

A. I parted with him near the City-Hotel, and returned through the crowd.

Q. Did he lodge at the City-Hotel?

A. He did.

Q. Did Mr. Goodwin go in then?

A. Not while I was there. (Witness being asked, stated the manner of Mr. Stoughton's fall as before.)

The Mayor. I understand you saw Mr. Goodwin using the dagger, by striking with the but end, and holding the blade, when Mr. Stoughton was retreating: and that you saw him have it when he fell, or immediately before. When did you see that dagger again?

A. I have an impression that I saw it a minute after the affray was over; but I did not see it in his hand at the time they stood looking at each other: and I have the impression on my mind, that

somebody picked it up and gave it to him when the affray was over, perhaps a minute after the time he was looking for his hat?

Q. Do you mean, sir, to state that as your positive testimony?

A. I do not state it as a matter of fact of which I am positive: it was a moment of confusion, and it is a very vague impression upon my mind.

The Mayor. What did you mean by "when the affray was over," was it after he fainted, or after he was carried into the store?

A. After he was carried into the store. But it is a very vague impression.

Griffin. When was Mr. Goodwin looking for his hat—at what part of the transaction, or how long?

A. I cannot say how long, for the moment Mr. Stoughton fell, my attention was more towards his person.

Q. If you saw the dagger then at all, it must have been after he was carried on the stoop?

A. It must have been so, if I saw it at all. The period of the transaction and the time are equally uncertain.

Q. Your attention was directed to Mr. Stoughton when in the act of fainting?

A. Yes, sir.

Q. And while he was removing to the stoop?

A. Yes, sir.

Q. During *that time* you have no impression that you saw any body handing the dagger to Mr. Goodwin?

A. It may have happened while they were taking him to the stoop; but it could not well have been then, as my attention was directed to Mr. Stoughton.

Cross-examined by Hoffman.

Q. At the moment the deceased fainted, did you see both the hands of the prisoner?

A. Yes, sir. I was standing close by his side. I saw both his hands, and no dagger.

The Mayor. I wish to understand precisely what you intend by "the moment after he fainted?"

A. The moment when he was supported by the persons who stood near him, and was carried towards the store. The *moment immediately after*, is more properly the moment when he was so supported. At that moment when the parties were both standing up, looking at each other nearly half a minute.

Q. When you were assisting to separate them, had Mr. Goodwin then the dagger in his hand?

Q. I was behind and might not have seen; but I suppose if he had had it in his hand I might have seen it, as his right hand was all the time exposed to my view. I was just behind Mr. Goodwin at that time—whether I took hold of him or not, I cannot say. I think I took hold of him by the collar; to say I saw his right hand, might be too particular: but that I saw his right arm, I can say with certainty.

Q. Was Mr. Goodwin's right hand or right arm in such a way, *at any time*, that you could not have a distinct view of it?

A. No: for the right side of his body, during the whole contest, was next to me, and I could, during the contest, see the right arm; but after I came directly behind him, I could not.

Q. At the moment of Mr. Stoughton's fall, could you see the prisoner's right hand?

A. I think I could, but not after that, when I came immediately behind him.

Q. At this very moment of the fall, might you see his right hand?

A. I might, but I do not positively undertake to say that I did see it.

(Here the mayor deliberately read over to Mr. Cambreleng his testimony as he had minuted it down, and the witness said that it was all correct.)

Q. Did you hear any dagger fall on the pavement, at the time of Mr. Stoughton's rising?

A. No, sir.

Q. Did you during any part of the whole of this conflict see Mr. Goodwin give a blow with the but end of the instrument?

A. I never did.

Q. Do you think he could have made the thrust and you not see it?

A. I think not. It would be very improbable.

By a Juror. At what part of Mr. Stoughton's person did the blows appear to be directed?

A. I never saw any blows made with the dagger, except with the handle, and at the head. He seemed to be very cautious of using the blade, and appeared to me to have received one or two blows during the time he was shifting the dagger in his right hand; he was then entirely exposed to his antagonist.

The Mayor. Do you state it as a matter of fact or belief that he received blows when he was changing the instrument? or is it an inference of your own?

A. It is an inference I drew from the situation of the parties.

Hoffman. According to the best of your recollection, did he not receive one or two blows while he was changing the instrument?

A. I did not see them, but I am almost certain it was so: which I conclude from the time he remained exposed by that and by the dropping of the scabbard, and changing the instrument.

(The witness here described and showed how the dagger flew halfway out, and how he took the handle and let the sheath drop, placing the dagger in his right hand.)

Q. Was there any intermission of the blows?

A. No. The battle seemed to me to be very nearly equal; and I thought from the time lost in changing the instrument, that Mr. Stoughton had the advantage, but the moment after, Mr. Goodwin had it.

Q. Do you mean to be understood, by Mr. Stoughton's retreating, that he did not seem to wish to continue the fight?

A. I saw no such disposition on Mr. Stoughton's part. The whole of the controversy did not last 16 seconds. It was so quick that no one interfered.

Q. Did you then consider the retreating of Mr. Stoughton to be for the avoiding of the fight?

A. No, sir. I thought both parties seemed disposed to fight, and I believe the number of blows were about equal on both sides.

Q. Did they appear to be of equal, or nearly equal strength?

A. Mr. Goodwin appeared to be the most active man. Mr. Stoughton I supposed to be the strongest. He was rather taller than Mr. Goodwin, perhaps two or three inches.

Q. While Mr. Stoughton was retreating, did he not give blows with as much severity as during any other part of the contest?

A. I think he did, but could not well judge of their severity.

Q. Did he only defend himself, or did he strike?

A. He struck.

Q. Had a great crowd assembled there before you and Mr. Goodwin left the ground?

A. A considerable crowd, about forty or fifty people.

Q. Did he discover any haste to be off?

A. None at all. I believe he went off with my approbation. The crowd was gathering every instant, and there was a natural excitement among them.

Q. Did you know any thing of his stopping to buy a hat?

A. I heard from Mr. Shelton, that he stopped at Mr. Brewster's. I left Mr. Goodwin in company with Mr. Shelton, near the City Hotel, when I returned to the crowd, where I was very much surprised to hear—(*witness was stopped by an objection to his testifying from hearsay.*)

Witness. I was going merely to repeat what formed a part of my testimony before the inquest and the grand jury. It was natural for me to repeat it, not knowing it was objectionable.

The Mayor. Describe how it passed after Mr. Goodwin had began to use the instrument.

A. I think, after that, he had the advantage, but not by the use of the instrument, rather by using both his hands.

Q. What was the reason did you think of his going back?

A. It appeared to me that Goodwin was the best fighter, and knew more about it than Mr. Stoughton.

Q. Did you consider the having of this cane as any advantage in giving the blows?

A. I think not. If he had held it nearer the end of the blade it might.

Q. Which hand of the prisoner seemed to do most execution?

A. I thought I perceived a bruise upon the right cheek, which must have been given with the left hand, and which seemed to have had the greatest effect.

Q. From all you saw of the situation of the parties, and of the circumstances connected with it—

Griffin. Let the witness be asked as minutely as possible, touching all the relative situations of the parties; but having told all the facts he knows, his opinions are not to be appealed to as evidence.

Emmet. The learned counsel forgets that we are now cross-examining the witness, and have a right to his belief. I contend, that for the enlightening of the jury, who could not see the facts with their own eyes, they should know the opinion of the witness who did see them, whether the accident could take place *otherwise than by the fall.* There will always be circumstances that cannot be translated, or rightly rendered to the juror by words, and the jury being to judge of the circumstances, ought to be acquainted with the conviction of the witness from all he saw and observed, and with the character of the transaction from the impressions it made upon him: for instance, whether it was accidental or otherwise. All this is necessary to lead the mind of the jury to the truth, and, perhaps, to prepare them for judging of other truths that may follow. And, indeed, unless you get rid of the cardinal rule, that on cross-examination you are entitled to a witness's belief, you cannot shut out this testimony.

The Mayor. The court think the question is not proper. It is the province of the jury to say whether the fact took place by accident or otherwise, and it would be substituting the witness in the place of the juror. It would be as competent to call any other witness and ask his inference. It is here said that there may be certain circumstances which might influence his conclusions, but that is a reason for not asking his opinion. Many circumstances may transpire to influence a witness to draw a conclusion that he ought not to draw, and therefore he should be confined to stating the facts, and not put himself in a situation to draw one conclusion, while the jury, from the same facts, might draw a different one. The argument of its being a cross-examination, cannot extend so far as to the asking of every question; on all cases and circumstances, the discretion of the court must govern, and counsel is not to examine how, and how long he pleases. The court, in its discretion, may interpose. I think the rule goes thus far, that you may test the witness by questions that are not even relevant; but suppose a witness gives an opinion, how shall you contradict him? You cannot bring other witnesses to contradict his opinions; therefore, though a counsel may travel out of the case to test his credit, it does not follow that you can ask his opinion. We should have made the same decision touching the opinion of the doctors, if the objection had been made by the opposite counsel.

Q. Do you know whether that was the cane Mr. Goodwin used to walk with?

A. I do not know, I never saw it before.

Q. Do you know whether Mr. Goodwin has ever been a military man?

A. I never saw him until this last summer. But I have heard, that he had been a military man.

Q. Did you see any marks of blows upon Mr. Goodwin?

A. None that I recollect.

Juror. Was the fall a severe one?

A. It appeared to me that Mr. Stoughton fell upon his hip; his legs appeared to fly up, and his head upon the pavements.

Q. Was the blade of that instrument concealed?

A. It was apparent all the time.

Q. Might not that have been the cause of his retreat?

A. I think it probable that it was.

Emmet. Is not this asking opinions of witnesses?

The Mayor. You have all along, upon that point, been asking opinions. The whole cross-examination has been to that effect.

Juror. What was the cause of Mr. Stoughton's falling?

A. I cannot say.

Juror. We wish to know, whether at the same instant that Mr. Stoughton fell, Mr. Goodwin fell also?

A. It was at the same instant: but Mr. Goodwin was not down so as to lose his balance.

Q. Were there blows just at the time of the fall?

A. There were.

The Mayor. Was Mr. Goodwin off his feet at any time?

A. He was not.

Hoffman. Where did he serve as a military man? was it not with Gen. Jackson at New-Orleans?

Some debate arose upon the propriety of this question.

The Mayor. I do not see that this question is improper. If you enter into such inquiries on the one side, it is open to the other; though I cannot see what it has to do with the case.

Juror. Did you see Mr. Goodwin give Mr. Stoughton any blows after he fell?

A. I did not see any blows.

Q. Did you see him slap him on the cheeks, as another witness has said?

A. I did not see it.

Q. If he had struck him with the head of the cane, would not you have seen it?

A. I must then, I think, have seen it, for he could not have drawn his hand to strike with the dagger without my seeing it. At least, I suppose, I must have seen it.

Fifteenth Witness for the Prosecution—Dr. Wright Post.

EXAMINED BY WELLS.

Witness. I was called to see Mr. Stoughton, but he expired the moment I arrived: I approached the counter on which he lay, and saw the wound.

Q. Did you probe it?

A. I did not examine it.

Q. Suppose that wound had been inflicted with an instrument of this kind, (showing it) and passed through the breastbone, could that have been done by a man of ordinary strength?

Emmet. I object to that, not only as a matter of opinion, but as a matter which cannot be answered, but with reference had to the circumstances and relative position of the parties; and, skilful as Doctor Post may be in anatomy, he cannot tell what the muscular force of a man can effect, till he knows and considers in what position he stands, and in what manner it is to be employed.

Wells. They have led the way to these inquiries, and set us the example: when it was for their advantage, the gentlemen found it proper; when it turns against them they think it improper. I only ask, whether there is any thing to prevent that instrument from producing that effect?

Emmet. It cannot be necessary to ask a doctor whether a dagger can penetrate into a man's body. There has been too much experience of that.

Hoffman. The testimony of Dr. Mott came out from the examination of Mr. Van Wyck. (Mr. Hoffman here read from his notes to confirm the assertion.) After he had given this testimony on his examination in chief, we only pursued the inquiry.

The Mayor. We may call physicians to tell us, if it becomes material, what obstruction the weapon would meet with in taking its course through a rib, breastbone, &c.; that depends upon technical knowledge, and falls under their province. If they could tell us the force by mechanical calculation, as so many pounds, &c. it might lead to the solution of a problem. But we have no such measure. But when we ask an anatomist whether the ordinary muscular force of a man would be capable of driving a given instrument through a given part or parts of the human body, it seems to me a technical question. When I spoke of the court's interposing, it was when the counsel were placing the parties in certain situations, and raising suppositions of what the parties might have done, if placed so and so, to answer which a fencing master would be fully as competent, or indeed any other person. And it matters not who began it, or upon whose side it came out. It has gone on by consent, neither party objecting; and it was impossible to stop what was but an answer to the opposite party.

Q. What impediment then, Doctor Post, might an instrument of that kind meet with, passing between the ninth and tenth rib, and splintering a part of one of them, and transfixing the heart, and indenting the breastbone?

A. The difficulty would be very little, except in touching the rib. All the other parts are soft and yielding, and very easily separated. There is little resistance except by the bone.

Q. Could the resistance of the rib be overcome by the force of a man of ordinary muscular strength?

The Mayor. Suppose there should prove to be a small fracture in passing, and the lower end of the rib broken off?

A. I should suppose the point of the instrument might take off a small part and penetrate the breastbone. There would be little resistance by the rib, and not much obstruction from the breastbone, which is of a much softer texture.

Emmet. If you took away a part of the rib, would not that create a constant or continuing impediment?

A. If it was only upon the side or edge of the rib, the moment the part is detached, it is, as to any further resistance or to any new force, as if it had not touched it at all.

Q. Would it not make a groove through which it must run?

A. I think the difficulty is so little as not to be computed.

Q. Where was the wound, was it not near the backbone?

A. I saw him expiring, and looked little further; a person uncovered the wound, it was nearer the back than the exterior part, but the moment the clothes were raised, the wound presented itself to me, so that it did not require any moving of the body.

Q. Would not one who examined it have been better able to describe the situation of it?

A. I think not, I had a very distinct view of it.

Sixteenth Witness for the Prosecution—Abraham Vervülen.

Being desired by *Mr. Van Wyck* to relate what he knew, this witness stated that he lived in Bergen county; that he accidentally saw the affray; that when he first saw the parties meet he was right opposite in Broadway, on the east side. He saw them meet each other and take a round or two, and saw one gentleman fall.

Q. Did you see any thing in the hand of either?

A. Yes.

Q. What did it appear to be?

A. It appeared first to be a cane.

Q. In whose hand was it?

A. It appeared to be in Mr. Goodwin's hand.

By a member of the Court. How do you know it was Mr. Goodwin?

A. The man who had it went away, and the other who was killed I was told was Mr. Stoughton.

Q. Did the cane separate?

A. I do not know whether it parted, or whether he drew it, but it separated, and the dirk part he kept in his hand.

Q. Did he continue striking after he had the dirk part in his hand?

A. He did.

Q. Did he strike with the dirk part at all?

A. Yes.

Q. Show how?

Witness. (Clubbing it and striking over hand) This way.

Q. Did you see when Mr. Stoughton fell?

A. Yes, I saw him fall.

Q. Did you see the dagger thrown away?

A. I saw it fly out of his hand.

Q. Where did it go to ?

A. It flew off some distance, perhaps eight or ten feet.

Q. At what time, or in what part of the controversy was that ?

A. It was after Mr. Stoughton fell.

Q. Do you recollect which way it flew from him ?

A. They were then in Courtlandt-street. It flew about a north-west course from where they were, pretty near the centre of the street ?

Q. Was this after Mr. Stoughton got up ?

A. Yes, it was after he made the attempt to rise.

Q. Had he got up before Mr. Goodwin threw away the dagger ?

A. He had made an attempt.

Q. Was there any one then helping him ?

A. Not at that time.

Q. Where did you see these two gentlemen first ?

A. On the walk in Broadway.

Q. Did you go over, and were you with them all that time ?

A. I stood by. I went as soon as I could get across the street.

Q. Were there many persons ?

A. A great many. I did not know any of them, except one Briggs, from our place, who was with me.

Q. Did you see that gentleman ? (showing Mr. Clark.)

A. I do not know.

Q. Did you see the prisoner strike Mr. Stoughton when he was down ?

A. I did.

Q. In what manner did he strike him ?

A. That way. (holding by the handle.)

Q. You never then saw him hold the blade and strike him with it ?

A. No, sir, I did not.

Q. Were you not sorry to see a man so struck and beaten—Did not you interfere at all ?

A. I did not interfere.

Here one of the jurors (Mr. Seaman) asked leave to speak with his clerk, which was by consent of parties granted ; but his clerk came to the box, and spoke in the hearing of his fellow jurors and others present, Mr. Seaman not leaving the jury box.

The Mayor here called the attention of the counsel, before the cause proceeded farther, to the point, whether, supposing the jury should believe that this wound was not given by a stab, but by consequence of some violence after the contest began ; as from a fall occasioned by a blow or other violent act of the prisoner ; and taking it for granted that such an act would be manslaughter, yet would such proof support the allegation in this indictment as to the manner of the death ? In the case cited yesterday, of the one holding the pitchfork and the other rushing on it, it is presumable the manner of the death was laid as it was proved.

The cause then proceeded.

Seventeenth Witness for the Prosecution—Major Richard Smith.

Emmet desired to know what it was intended to prove by this witness.

Van Wyck. To identify the swordcane and show how the prisoner came by it.

Q. By Van Wyck. Do you know that swordcane, sir?

A. Yes, sir, it was once in my possession. There was an exchange of sticks between Mr. Goodwin and myself. I was dining, accidentally, at the City-Hotel, on the Monday preceding this affray. Not being there with any person in particular, I discovered, during dinner, that Mr. Goodwin was at the table, but ten or twelve from me, on my right, sitting at the eastern end of the table, next to Broadway. As the company went off during the afternoon, whilst I was sitting with a bottle of wine before me, Mr. Goodwin and his friends collected towards the end of the table where I was sitting. During the afternoon we sat and drank, Mr. Goodwin and several other gentlemen. We drank about half a dozen bottles of wine between four or five of us. A variety of conversation took place at table, and about candlelight, or after sundown, some gentlemen talked of going to the Theatre; and Mr. M'Crea came in and sat between me and Mr. Goodwin. I got up and had my hat in my left hand, and my stick in my right. I had my foot up on the chair. We proposed meeting at the Theatre at nine o'clock. Whilst standing in that position, and laughing at some little conversation that passed about the dinner table, Mr. Goodwin, probably from seeing this stick, proposed an exchange of sticks, to which, after some trifling observation, such as that it was a favourite stick, I assented. Mr. Goodwin, on seeing it, had held out his hand for it, so I passed it to him. He said, there is my stick on the sideboard, and I will keep yours as a keepsake. I observed that it opened too easily, and that he should keep the string tight round it. The one I had from him was smaller, but it had no sword in it; it was a common walking stick, with a head mounted pretty much like this. Having exchanged canes, we all got up and separated. We left the dining table; myself, Mr. M'Crea, Mr. Goodwin, and Mr. Sheldon. The whole of this conversation took but little time, perhaps four or five minutes, and it was a mere accidental circumstance, little thought of by me, or, as I believe, by Mr. Goodwin.

Cross-examined by Hoffman.

Q. You have known Mr. Goodwin some time, sir?

A. I have known him from his infancy: I have been acquainted with his family as well as with himself.

Q. This cane, you say, was asked of you merely as a memorial or a keepsake?

A. Entirely so. It was as unthought of till the moment by him as by me.

Q. When he asked you for it first, did he know it was a swordcane?

A. I have visited him frequently when he was confined; he might have seen the cane, and he might or might not know it had a sword in it.

Van Wyck. Had he any opportunity of knowing that there was a sword in it?

A. I have frequently visited him, but I do not know that he ever saw the sword, or that it ever was in his hands before.

Here the prosecution rested.

EVIDENCE FOR THE PRISONER.

On behalf of the prisoner was sworn—Wm. L. Rose.

Mr. Rose stated that he had seen the cane produced at the inquest of the coroner; that it had leather strings attached to it, which this has not. But after a short explanation, the identity of the instrument was admitted.

Mr. Wilder recalled, and examined by Emmet.

Q. Have you any recollection of having seen a dagger like that, lying on the ground near Mr. Stoughton where he lay?

A. I did see a dagger similar to this, within a moment or two after they were separated, and my impression is that it was upon the ground. If I did see it on the ground, it was near where the parties were. It is possible it may have been in some person's hand; but my impression is, that it was on the pavement. That is my prevalent impression, that I saw it on the pavement after the parties had risen, and after they were separated, after Mr. Stoughton was raised up, and, I think, when he was leaning on the person's shoulder.

The Mayor. I think you said, when you was examined before, that you could not tell whether it was in the hand of some person, or on the ground?

Emmet. Can you answer with more precision now, whether you saw it in the hands of the prisoner?

A. I am by no means positive. But I think not. The most I saw of the prisoner was when he was looking for his hat. He had then a hat in his hand.

Witness for the Prisoner—James W. Lovett, one of the keepers of the Prison.

Witness stated that he saw the prisoner the next morning after his commitment, and that there was a mark under his eye, which seemed swollen and bloodshotten.

Van Wyck now offered testimony to prove the declarations of the prisoner, that he intended to insult Mr. Stoughton; and that if Mr. Stoughton attacked him in consequence of that insult, he should use his cane to him.

Hoffman. As I understand the testimony offered now, we object to it: because it would lead to inquiries that would be endless. The court will see that the previous declarations, even if once made, may have been afterwards abandoned; and if they should come now before the court isolated, they might fix upon the prisoner inten-

tions which he had explicitly disavowed: but which disavowal and change of intention, he could not be prepared to prove. The gentlemen offer to show antecedent expressions; if they may prove expressions of yesterday, they may prove by the same rule, others ever so remote.

Griffin. We here offer to show certain declarations not longer ago than the day before, as to what he intended to do in case he met Mr. Stoughton.

Hoffman. The charge is manslaughter, which in itself must be considered to arise on a sudden from the immediate provocation and the heat of passion at the moment. Now to give a new character to this act, and try us upon a charge of murder, which we cannot be prepared to meet, is against the first principles of law. We come here to answer to the transactions of that day and that hour, not to rebut other charges. We were obliged to meet the witness as to what happened at the time he struck with the sword blade, because it made part of the transaction. But if these declarations amount to any thing, it must be where the charge is murder, and the *malice prepense* is essential. If the prisoner had been indicted for murder, we might have been prepared to obviate all possible charges of malice aforethought. In *Selfridge's Trial*, Chief Justice *Parker* confined the prosecutor to the very transaction, and it was by consent that they went into the circumstances between the parties. Suppose, for argument, that Mr. Goodwin had first expressed an intention to insult Mr. Stoughton, and had insulted him, and Mr. Stoughton had declined going into explanation or giving satisfaction, and then the prisoner had said, I will now have no more to do with him. It would be hard that his first declarations should be proved, when his after declarations could not, because of the surprise.

Wells. As this appeared before the inquest, we thought it our duty to offer it, but we do not mean to press it.

The Mayor. Then if you do not think it material, I would rather not give an opinion upon it. A court should be cautious in such cases of volunteering opinions not called for.

Van Wyck. I would willingly waive the testimony if it depended entirely upon me: although I must say, that it will have some bearing on the question, and I cannot waive it so as to admit, that the intent is immaterial to this cause.

Emmet. I do not deny, that if a party is indicted of manslaughter, and in the course of the trial the facts growing out of the transaction would make it murder, inasmuch as they are part of the *res gestæ*, they must be given in evidence; but when they attempt to give matters not growing out of the transaction, nor essentially characterizing it, I conceive they are irrelevant and inadmissible. What is the prisoner to be prepared to meet? The facts stated in the indictment. He is not supposed to be gifted with the spirit of prophecy, nor to conjecture or foresee things not in the indictment, which is the text book. If it is stated that he, of malice aforethought, did the act, then that word would apprise him that malice aforethought was charged against him. When the indict-

ment is without that, he dismisses from his mind all consideration relating thereto, and all evidence touching that takes him by surprise: he finds a new character, and a different one, in the middle of the trial, given to the offence, which of course he is unprepared to rebut. It is a rule held sacred, that a man in the situation of my client is to be apprised of every thing that he is bound to answer to, and not when his person is imprisoned and his mind ruffled and troubled, to be called upon on a sudden, to rebut, by evidence, facts of which he had no notice. He should know every thing that is to be brought against him before he comes to trial, when his mind is cool, and when he can weigh the matter and collect his thoughts; and not be attacked, if I may use the phrase, by an ambuscade of evidence not appearing on the record. There is no question that the testimony now offered, if it can have a bearing on the act of the party, can only be to change manslaughter into murder; for it can have no bearing to alter the offence charged if it was accidental, and the antecedent quarrel cannot alter the matter one way nor the other, as long as it is a trial for manslaughter.

Mr. Emmet enlarged upon this, and spoke particularly of one witness who had gone upon pressing business to the Havana, as soon as it was known that the prisoner was only charged with manslaughter, and was told that his evidence would be unnecessary; but who would have staid, at every risk and loss to his own private fortune, had not this been understood: that the court knew, also, that in this case, the witness could not be examined out of court. If a declaration of a day before would alter the transaction, so would one of a year before, and my client must be prepared for all; and from the oracular language of the counsel, this appears as but an entering wedge. A day, a month, a year, are all equal upon principle, and then we see what a floodgate is thrown open to let in charges impossible to be answered. Whatever makes a part of the crime charged is evidence; and though it tends to convict, we cannot object to it. But where the matter is not a necessary ingredient to make it either manslaughter or any other kind of homicide, it is inadmissible. I invoke the salutary principles and rules of law laid down in the trial of Selfridge, as the shield with which the law protects the accused, when his life, his liberty, or his character is attacked.

The Mayor. I have given a previous intimation on this point: but made up no opinion, being free to alter my views upon hearing sufficient argument. But I must regret that I am obliged to differ with the counsel; I must say that I do not find this decided in *Selfridge's case.* The matter was talked over by the court and the bar, and the court gave no opinion. The counsel agreed upon condition that the evidence should go no further than to the point in discussion, and there was no other decision. I can find no direct authority, and I think the counsel must have found none. We must then go upon general principles. It is impossible, in a court constituted like this, to have consultations upon every point. I therefore give my opinion:

The prisoner is indicted for manslaughter, and here has been *competent* evidence to prove the fact, that the deceased came by his death through the instrumentality of the prisoner. The charge is manslaughter, and when the death is proved to be by his agency, it is for him to bring forward his justification or excuse. The defence here must be, either excusable homicide *per infortunium*, or chance-medley, or self-defence. All the testimony must go to the one or the other of these. And such must be the testimony offered by the prisoner, if it be once admitted that he killed the deceased, or if there be evidence enough to put him upon his defence on that point. Then he says: "True it is I killed that man, but it was the result of a sudden affray in which I was attacked." The prosecutor rebuts this defence, by showing that it was a premeditated one; and to this end, they offer the prisoner's conversation of the day before: and I do not think it makes much difference whether it was a day or a week before. If it is to be determined by dividing of time, the jury must say what will be the effect of the distance of the time, as they judge of all other circumstances. But I cannot conceive that, because this gentleman is not indicted for murder, they may not show that it was in consequence of a premeditated design. Suppose, for argument sake, the fact to be, that the prisoner prepared himself for this *rencounter?* Suppose Mr. Stoughton should have told us that the night before, or only a few hours before, the prisoner had obtained this cane, telling the witness that he wanted to chastise Mr. Stoughton with that very instrument; is it possible that such declarations could not be received when the defence set up is, that it was a sudden affray? If they can show that he had prepared himself for this thing, and had armed himself for the purpose, I cannot conceive the evidence to be improper, merely because it is an indictment for manslaughter. I think the indictment did apprise him of his defence, though it did not put him upon trial for murder; he knew that he was charged with feloniously killing, and that he was to rebut that charge. The distinction cannot be so strong as the counsel insist: for, supposing the charge to be murder, it would *not of necessity* follow even then, that he was to rebut the allegation of *malice prepense;* it would depend upon his own knowledge of the facts. And it did not follow that the prosecutor would, or would not, produce evidence of the aforethought malice, for it might or might not be implied from the nature of the transaction, and evidence of premeditation might or might not be given. He therefore was to be prepared or not, as he thought fit to consider his own case; and it would not surprise him less or more than this does now. My individual opinion is, that the offer made is proper: that is, to show by his declaration of the day before, that he had contemplated a *rencounter* with Mr. Stoughton.

Emmet referred to several passages in the trial of *Mr. Selfridge*, and expressions used by Chief Justice Parker.

The Mayor understood those expressions as applying to the controversy between Mr. Selfridge and Mr. Benjamin Austin, and not applying to this question. But after consulting the other members

of the court, he said, it was the opinion of the court that this evidence would be improper.

Griffin then offered evidence of declarations and acts of the prisoner *on the day of the rencounter*, but was overruled, because it fell under the same principle on which the former had been refused.

Doctor Schieffelin was called again to show that he had, when trying the wound with the instrument, cut off the leather strings. This was to obviate any objection as to its identity.

Mr. Clark was also recalled and asked at what precise moment he saw the cane.

Witness. I came in between them and separated them, and the other person, as I have said, caught the deceased as he was about to fall. It was at that time when Mr. Goodwin and I stood side by side, that I saw the dagger in his hand. When Mr. Stoughton fell back I kept my position long enough to exchange looks with the prisoner. I did not see the dagger afterwards till the time the body was examined.

The Mayor. In what manner did he hold it?

A. Carelessly, thus, (showing.) When Mr. Stoughton fainted, and I saw another person catch him, I turned to Mr. Goodwin; my right shoulder near to his left; and that was the only time I saw it. I should be willing, if it be proper, now to add another circumstance that escaped my recollection. When the prisoner knocked the deceased down, he followed, from the force of his own blow, as it appeared to me, bending from his hips, and went off the sidewalk, stooping with the blow he had given with his right hand.

A Juror. You saw no dagger then in his hand at the time of his first fall?

A. No. The first time I saw it, was after Mr. Stoughton rose, when Mr. Goodwin stood beside me. The weight of his own blow forced him forward so that he stepped into the gutter. My impression is distinct that the blow was with the right hand. And my recollection is pretty clear that it was a blow on the head with the fist. I was then about as far distant as the width of Courtlandt-street. I was upon this corner and they on the other. The only two blows that I saw, were, first a blow from Mr. Goodwin to Mr. Stoughton, which knocked him down, and that which Mr. Stoughton returned when he rose. Mr. Stoughton fell nearly at full length, but I think he saved his head by taking the force of the blow upon his hips. His second fall was not far from where we stood. Whether on his second fall they let him down at full length, or his knees only gave way, I cannot say. Nor can I recollect the very spot in which he fell the second time, but by conjecture from where he fell the first time. For at the moment of his second fall my attention was first turned to Mr. Goodwin, and afterwards, when Mr. Stoughton fell, I thought more of his condition than his position. I should suppose it was eight or ten feet from the corner of the curbstone.

The Mayor. Do you speak of his feet being so far distant?

A. I have no recollection of his body lying at full length the second time. The first time he fell at the angle of about forty degrees over towards the opposite corner. I do not think they suffered him to lie down the second time. The second time he was facing the corner opposite which he fell. I think the second time when I turned from Mr. Goodwin, he was raised, or attempted to be raised. But he was never on his back the second time.

Mr. Griffin. Before the counsel for the prisoner proceed to address the jury, I will read, from books of authority, some further principles and cases upon which we expect to rely.

Foster's Introduction to the Discourse on Homicide, § 1. p. 255. "In every charge of murder, *the fact of killing being first proved*, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is that the law should so presume. The defendant, in this instance, standeth upon just the same foot that every other defendant doth: the matters tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them."

To show that wherever the defence of accident is relied on in a case of homicide, it must appear that the person committing the homicide was not engaged in an unlawful act, or using an unlawful weapon. I will read to you from 1 *Hawkins*, 111. ch. 29. § 1. "And first of homicide *per infortunium*, or by misadventure, which is, where a man in doing a lawful act, without any intent of hurt, unfortunately chances to kill another."

East, in treating upon homicide in the prosecution of some act or purpose, criminal or unlawful in itself, wherein death ensues, collaterally to or beside the principal intent, vol. 1. ch. 5. § 31, 32. observes:

"I say, *collaterally to or beside the principal intent*, in order to distinguish this kind of homicide from that before treated of under the general head of malice aforethought, where the immediate and leading purpose of the mind was destruction to another."

"And first, it is principally to be observed, that if the act on which death ensue be *malum in se*, it will be murder or manslaughter, according to the circumstances: if done in prosecution of a felonious intent, however the death ensued against or beside the intent of the party, it will be murder; but if the intent went no further than to commit a bare trespass, it will be manslaughter. As where A shoots at the poultry of B, and by accident kills a man: if his intent were to steal the poultry, which must be collected from circumstances, it will be murder, by reason of that felonious intent but if it were done wantonly and without intent, it will be barel manslaughter. A whips an horse on which B is riding, whereupo the horse springs out and runs over a child and kills it: this is ma slaughter in A, but misadventure in B."

"He who voluntarily, knowingly, and unlawfully intends hurt to the person of another, though he intend not death, yet if death ensue, is guilty of murder or manslaughter, according to the circumstances. As, if A intending to beat B, happen to kill him, if done from preconceived malice, or in cool blood upon revenge, it will be no alleviation that he did not intend all the mischief that followed."

Foster, Disc. 2. ch. 1. s. 1, 2, speaking of homicide occasioned by accident, says: "In order to bring the case within this description, the act upon which death ensueth must be lawful. For if the act be unlawful, I mean if it be *malum in se*, the case will amount to felony, either murder or manslaughter, as circumstances may vary the nature of it. If it be done in prosecution of a felonious intention, it will be murder; but if the intent went no farther than to commit a bare trespass, manslaughter. Though I confess Lord Coke seemeth to think otherwise. "He (saith the learned judge) that voluntarily and knowingly intends hurt to the person of a man, though he intend not death, yet if death ensues, it excuseth not from the guilt of murder, or manslaughter at least—as if A intends to beat B but not to kill him, yet if death ensues, this is murder or manslaughter, as the circumstances of the case happen."

1 *East*, ch. 5, § 42. "And therefore in Ward's case, who was challenged to fight by his adversary for a public trial of skill in boxing, and was also urged to engage by taunts, although the occasion were sudden, yet having killed his opponent, he was holden guilty of manslaughter."

Wherever a person uses an unlawful weapon or instrument, the law considers him as doing it at his peril.

1 *East*, ch. 5, § 37. "Thus parents, masters, and other persons having authority in *foro domestico*, may give reasonable correction to those under their care; and if death ensue from such correction, it will be no more than accidental death. But if the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances. If done with a cudgel, or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter: if with a dangerous weapon, likely to kill or maim, as a pestle or great staff, it will be murder: due regard being had in both instances to the age and strength of the party. Grey, a blacksmith, struck his servant with a bar of iron, by way of correction for improper behaviour, by which he was killed; held murder. A woman kicked and stamped on the belly of her child; and ruled the same."

"Yet though the correction exceed the bounds of moderation, yet the court will pay a tender regard to the nature of the provocation, when the act is manifestly accompanied with a good intent, and the instrument not such as must, in all probability, occasion death; though the party were hurried to great excess. As was the case of a father, whose son had frequently been guilty of steal-

ing, complaints of which had come to the father, who had often corrected him. At length the son being charged with another theft, and resolutely denying it, though proved against him, the father, in a passion, beat his son with a rope by way of chastisement for the offence so much, that he died. The father expressed the utmost horror, and was in the greatest affliction for what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The learned judge who tried the father, consulted his colleague in office and the principal counsel on the circuit, who all concurred in opinion that it was only manslaughter: and so it was ruled."

1 *East*, ch. 5. § 41. "Upon this distinction as to the nature of the weapon, Sir *John Chichester's* case seems to have turned, who unfortunately killed his man-servant as he was playing with him. Sir John passed at him with his sword in the scabbard, which the latter parried with a bed-staff. In the heat of the exercise the chape of the scabbard flew off, and the servant was killed by the point of the sword. Mr. justice *Foster* thinks, in conformity with Lord *Hale*, that there was evidently a want of common caution in making use of a deadly weapon in so violent an exercise, where it was highly probable that the chape might be beaten off, which would necessarily expose his servant to great bodily harm. It was therefore rightly adjudged to be manslaughter."

Wherever a person designedly provokes a quarrel, he will be considered the aggressor in that quarrel, though he may have induced the other party to strike the first blow. (1 *East*, ch. 5, § 23.) "In no case, however, will the plea of provocation avail the party, if it were sought for and induced by his own act, in order to afford him a pretence for wreaking his malice. As where A and B having fallen out, A says he will not strike, but will give B a pot of ale to strike him; on which B strikes, and A kills him: this is murder."

"And in all cases of provocation, in order to extenuate the offence, it must appear that the party killing acted upon such provocation, and not upon an old grudge, for then it would amount to murder."

To the same purport is 1 *Hale's Hist. P. C.* p. 457.

When *Mr. Griffin* concluded, some discussion took place about the propriety of adjourning; but one of the jurors requested that Mr. Maltby Weed should be recalled, and that he might be asked a few questions; which was granted.

Juror. When Mr. Stoughton was lying on the ground, and you saw the dagger on the ground, how far was it from him—was it a foot?

A. My memory does not serve me exactly. It was very near him when he lay the first time on the ground.

The Mayor wished it to be understood, that when the court adjourned the testimony should be closed, otherwise the court would

sit till twelve o'clock, or till it was gone through. It being so understood by both parties, the court adjourned at 5 o'clock, P. M.

FOURTH DAY.—FRIDAY, MARCH 17, 1820.

The Court met at half past 11 *o'clock A. M.*

PRESENT AS BEFORE.

Proclamation being made, and the jury called and answering to their names, the counsel for the prisoner proceeded to sum up the evidence.

OGDEN, *for the Prisoner.*

I rise, gentlemen of the jury, to sum up the evidence in this cause, overwhelmed with such feelings as I never before experienced. The circumstances of the case are so extraordinary, and the fact laid to the charge of the unfortunate young gentleman who stands accused before you, and whom I stand here to defend, was attended with circumstances so shocking and so horrible, so calculated to make a deep impression upon the hearts and minds of every citizen in this community, that rising to address you on behalf of the accused, I should be inexcusable if I did not feel the weight of my task, and the possibility that, however innocent the prisoner at your bar, yet that he might be convicted.

You are all but men, and in a case too well calculated to inflame the passions and prejudices of men, what man can say that his judgment will remain clear, unclouded, or unbiassed? I own that, though I believe this defendant innocent, I fear that he may be convicted; because I know, from my own feelings, and from sad experience, that when my passions, prejudices, or feelings, have been once strongly excited against an individual, I cannot afterwards contemplate his case with candour.

I can only therefore call upon you by all that is most precious to you, to keep a watch on your own frailty, and to decide between the people and the prisoner with impartiality. The fact which gave rise to this prosecution, the dreadful consequences of that fact, the manner in which the unfortunate man met with his end, are such as to arouse the strongest feelings in the mind of every one who has heard the story fly from mouth to mouth. It is impossible it should be otherwise.

Gentlemen, it is not for me to pass an eulogy on the character of the deceased, and it is far from my intention to say any thing against him: he is gone, I hope, to a better and a happier world. For his parents I feel every thing: would it were possible for me to pour the balm of consolation into their almost broken hearts. But I shall never cease to regret that the misfortune of Mr. Stoughton's family had not given rise to better feelings down to the present moment. I shall ever regret that their hearts, softened by their sufferings, had not sought consolation where it was to be found, rather than in vengeance against this unhappy man who stands before you at your bar; for no effort has been omitted to excite the pub-

lic indignation against my client, to hold him up to the world as a murderer, and take his life through the instrumentality of a court of justice.

Can it afford any comfort to the friends of Mr. Stoughton that this young man should be convicted? Will it restore him to their arms? Will they feel his loss the less? No, gentlemen. But this defendant has parents and friends also; an ancient, venerable, respected, and beloved mother: must her heart too be broken? will that relieve the feelings of Mr. and of Mrs. Stoughton? Their son is gone with a character unblemished and undisgraced; they can still derive consolation from the knowledge that he died undegraded. Convict this defendant, send him to the state prison, and to his mother's heart the hand of an assassin would be that of a beneficent deliverer. But I fear my feelings are leading me further than I ought to go, and further than I intended. I shall, I hope, be able to take a candid, fair, and impartial view of the testimony in this cause. I wish to assist you in the consideration of that testimony, by such arguments as I can offer, and it is not my intention, if it were in my power, to stir your passions.

Permit me here to ask, what is the question you are to decide upon? Because, before we proceed to examine the evidence, it is necessary you should have a clear view of the question to which it is applicable. The grand jury have found a bill against this defendant, for that he with a certain drawn dagger or sword, which he held in his right hand, in and upon the left side, near the ninth rib of Mr. Stoughton, did thrust, stab, and penetrate, giving the deceased a mortal wound. To this charge, the defendant pleaded he was not guilty, and the only question is, whether the prisoner at the bar did, holding that dagger in his hand, stab the deceased? In this case, as in all other criminal cases, you the jury are to judge of the law as well as the fact: and you will, no doubt, take advice from the court. But after all, it is you that are to decide both law and fact, and I am happy to tell you, that after a review of all the cases upon the principles here to be decided, and from the gravest authorities of the law, you will be enabled to decide without much difficulty: and I shall refer to some authorities, which seem to contain within themselves every principle useful or necessary for your consideration. Whilst I state them to you, I am to be understood at the same time, as submitting them to the court, in the hope that both court and jury will agree, that this is not to be considered as manslaughter. The law is without mystery, and founded upon clear principles of common sense. Some cases render it less clear, and there are some which the looking into will rather perplex than enlighten the judgment of a jury. The indictment does not charge manslaughter, by that general term, for such an indictment would not be good. The overt act must, upon principles of common justice, always be set forth, that the prisoner may know precisely what he is charged to answer. That course has been properly pursued in this indictment, and the charge here is, substantially, that the prisoner, with a

dagger in his hand, struck the deceased, and gave him that mortal wound of which he died.

The books say, and the court will so advise you, that the manner of the death is an essential part of the charge in all cases of manslaughter. In 1 *East's Crown Law*, 341, this doctrine is clearly expressed: and if the indictment states the death to be by a blow, the manner of the blow must be stated. And there, though the blow was alleged to be with a staff, and the proof was of a blow with a stone, it was held good proof, on the ground that it was the same kind of wounding, viz. by a blow. If, however, gentlemen, you should be of opinion that Mr. Stoughton fell upon this dagger, even though the defendant had it in his hand, he cannot be convicted under this indictment, for that would not be the charge we came to answer to. In order then to convict, you must be convinced, first, that the fatal wound was given by the dagger held in his hand; and secondly, that it was by a thrust with that dagger he caused his death; and if we are wrong here, you must be of opinion that the killing in the way I shall show he was killed, amounted to manslaughter. And this leads us to consider what manslaughter is. It is not every killing of a man: the killing may be murder, which is the highest crime by our laws next to treason, or it may be in self-defence and justifiable, or by accident and then excusable; and whether it amount to a crime at all, must depend on the nature of the case and the intention of the party. If I kill a man with malice aforethought, as if, in consequence of any offence, I go deliberately with premeditation and kill him, it is murder: because I did it with a firm and fixed design, and full intent to kill him. If I kill a man unlawfully and wilfully, but without malice aforethought, it is not murder, but manslaughter; for example: if I unexpectedly get into a quarrel, and in a sudden passion, having a stick in my hand, I kill my adversary, it is not murder, but manslaughter, because there was no malice nor no previous intent; but because it shows an unjustifiable degree of passion it is manslaughter, it being a necessary principle upon which the peace of society depends, that men must be taught to curb their passions, and not be hurried by their intemperance to the destruction of a fellow creature.

If on a sudden affray, without any unlawful act of mine, my adversary is killed, it is accidental death: and if it be accidental, it is no crime; for no man can be made to answer criminally for the consequences of a mere accident. So if a man attack me in the street, and I have just reason to believe that he intends to kill me, I have a right to take away his life, because it is an act of self-defence, and self-defence is the first law of nature, and always admitted by the common law. These form the substance of the cases in the Books. The gentlemen can find none, however varied in circumstances, that do not turn upon the principles I have now laid down; for in homicide, as in all other cases, it is the intent that constitutes the crime. If no intent, there is no crime; nor is there, nor should there be punishment. If, therefore, from a careful examination of the evidence, I shall be able to show you

is misfortune proceeded from no evil intent, you are bound
uit, and never can convict.
nit me now to beg your patient attention while I go through
dence, which I mean to do carefully and candidly. I mean to
every thing that makes either for us or against us, and if I
ny thing, it will not be for want of intention to give you a
d candid statement.
ore I proceed to dissect the evidence, let me ask if it has not
y left doubts upon your minds. Is there a man who does
ubt, at this moment, whether this act was committed by ac-
, or by design? and if such doubts exist, you are bound to
. All we have to do, is to show the evidence to be doubtful,
him the merciful principle of the law, which would rather
-nine guilty should escape, than one innocent be punished.
nayor has told you, in the course of the cause, that where
was doubt touching the admissibility of evidence offered by
isoner, he was bound to admit it rather than refuse it, the
ways inclining to the side of mercy. So if you have any
upon the whole evidence, you cannot take upon you to con-

me make another general observation. This affray happened
of our public streets, and the most public in our city. These
en are found in a scuffle—all such things as happen in an or-
scuffle, would pass without much observation by any witness,
e nobody notices common and passing events. But if any thing
al occurs; if the assault was committed with an unusual weapon,
nusual way, it is likely to fix the attention of every man; and
dagger was used to stab, it could not be that not a single man
ved it. This alone ought to acquit the defendant, for it is im-
le, that amongst all who were looking on, no one should take.
of it.
, gentlemen, we do not rest upon these general observations.
ambreleng tells you he saw the right hand of Mr. Goodwin
hole time of the conflict, and till Mr. Stoughton was on the
d. Is it possible the stab should be given and he not see it?
ave heard of the nature of this wound, the course the in-
ent took, and the violence with which it entered the body of
eceased between the ninth and the tenth ribs, with so much
that it splintered off a part of one of those ribs. Dr. Mott,
xamined it, thinks it was part of the tenth, the other doctor
, of the ninth rib. Dr. Mott tells you that, in his opinion,
beyond the strength of any ordinary man to have inflicted
ound; that no man of ordinary muscular strength could have
ower. We are not told how much was splintered off; but
Iott saw the rib and had ocular demonstration, and is the
rest person to judge of the force required. Dr. Nelson tells
t, in his opinion, it might have been given with a dagger in
ands of a man. But he never saw the wound; never ex-
d more than the orifice merely. He did not know how much
splintered off, nor search into it, but he thinks a man could

have inflicted it. He goes farther and says, that not only was it in the power of a man to inflict it by mere muscular strength, thus forcing it into the body, but he has given us a fact as conclusively demonstrating that it could not be given in that way, and I think he has given an opinion not founded by the fact. He tells us these are called false ribs, and are very elastic. Now, gentlemen, if the point of this instrument was pressed upon my finger, it being an elastic body, would yield to the weapon; which shows that the wound could not have been given by mere pressure. But this rib was beyond question splintered: to take a piece off an elastic body, it must have great velocity as well as force; therefore, the very fact he states, will show that it could not have been given but where velocity and force were combined. Dr. Post thinks a man holding this dagger with the hand, might have given this wound, but does not say that strength alone, without velocity, could have effected it. He thinks a man of ordinary force might give it; but the gentlemen did not ask the question whether, without a quickened motion, mere strength could have achieved it. If, therefore, it was given at all by the hand, it must have been given with much force and an extended arm; and how can you think he brandished it in his right hand, extending his right arm to acquire that accelerated motion, and of twenty or thirty standers-by and lookers-on, not one pretends he saw it? Is there a man among you then who will undertake to say, upon his oath, that this was so, and that he has no doubt it was so? If not, and you have doubts, you must acquit. If you are not positive he did inflict the wound, you never can convict him.

But now I may be asked to say, how was this wound given? To that I say, first, that it is not material to our defence to show how it happened. I am prepared by the cases cited by the gentlemen, to admit that, the killing being proved, the showing of an excuse belongs to the defendant. But I maintain, that they must first begin by showing that the prisoner killed the deceased, that he did stab him; when that is done, we are bound to show either that it was upon a sudden quarrel, or that we did not intend to kill; and then it will be either murder or manslaughter, unless it were in self-defence, in which it would be neither, but an act entirely innocent. It is in vain then to say that we must make out our excuse, for, if they do not make out the fact they charge us with, the prosecution must fall to the ground.

Permit me now to take a view of the evidence as to the probable manner in which this wound was given. My own opinion is, that the most probable, and certainly a possible way, is, that when Mr. Stoughton was falling, by some accident or other, this dagger must have got out of the hands of Mr. Goodwin, entangled probably in Mr. Stoughton's capes, and he must have fallen upon it. And this gains probability from the position in which he fell. Mr. Cambreleng tells you he fell on his left hip, and the wound was nearer the backbone than the side. Mr. Clark says that he fell on his breech. M'Gowan says on his rump. And these are the only witnesses that

speak as to the manner of his fall: and they agree with the manner in which Dr. Mott thinks it must have happened: namely, by his falling on the dagger.

Thus, gentlemen, if the wound was given by Mr. Goodwin with that dagger, it must have been either the instant after Mr. Stoughton fell, or after he was on the ground. Now the physicians one and all agree, that it was impossible to have inflicted it as he was falling, for then it must have taken a different course. He could not have given it when he was on the ground lying upon his back, for it was then impossible to wound him in the back. It must then have been while he was standing up, and before he fell.

Now what is the evidence on the subject of this fall? Mr. Clark says he saw the defendant hit the deceased upon the head, and with his hand, and so knock him down, and he saw nothing in Mr. Goodwin's hand at that time. If he is to be believed, then the blow that knocked him down was not given with the dagger at all, nor at the time it was given had he the dagger in his hand. Mr. Weed says it was given with the cane; he saw but one blow, and it was that which knocked Mr. Stoughton down, and with it the sheath flew off. Mr. Weir saw several blows all given with the cane, but he never saw the blade till after all was over. Mr. Haycock says he struck him with the head or handle of the cane. Mr. Ball says he held it by the blade, and so does M'Gowan, and that he struck him with the butt end foremost.

I am bound to admit, from a view of all this evidence, that Mr. Goodwin had this stick in his hand at the time Mr. Stoughton was knocked down, though Mr. Clark states he had no stick in his hand at that time. But I am compelled to admit that he had it in his hand, and held it in this way: (showing) and the probability is, that while Mr. Stoughton was in the act of falling, this dagger, by some unfortunate accident, must have fallen from the hands of Mr. Goodwin, become entangled in the clothes of Stoughton, and he have fallen upon it.

If then I shall be able to satisfy you that Mr. Goodwin had the dagger in his hand before the fall, and that immediately after he had it not, the conclusion is irresistible that he must have lost it just as Mr. Stoughton fell. Mr. Clark was close to them at that moment, and immediately interfered between them. The deceased was down, the prisoner was leaning over him: if Goodwin then held a dagger in his hand, Clark must have seen it; and yet he tells you the first he ever saw of it was after Mr. Stoughton had risen up, and struck a blow at the prisoner, then stood a while, and finally fainted away. The inference is clear, that at that moment the prisoner had it not.

Mr. Weed did not see the prisoner have the dagger after Mr. Stoughton fell. Mr. Baker says, that when he was down, he saw Mr. Goodwin strike him several blows on the head with his open hands. It is impossible that he could then have held the dagger. Mr. M'Williams tells you, that when Mr. Stoughton was down, the defendant was striking with his fists, and he was the first that came

upon the ground after Mr. Clark. He never saw him have a stick or any weapon till after Mr. Stoughton fainted. He came up when he was on the ground and saw every thing that passed, and was confident he had not the dirk, and never saw it till after he had risen and fallen again. Mr. Phelps, who thinks the deceased must have fallen as he was crossing the street, never saw cane nor dagger at all. M'Gowan says he thinks it appeared to him that he saw the dagger on the ground, but he is not certain, and the time he speaks of was when Mr. Clark was there, and at that time the evidence of Mr. Clark shows he had no dagger. Mr. Wilder says he struck him first with the one hand, and then with the other: he had a direct view of him all the time, and Mr. Goodwin had no weapon in his hand. Mr. Cambreling says that Mr. Goodwin did not, nor could not have struck him with a dagger when down, or he must have seen it.

If these were all the witnesses to show that the prisoner had the dagger when the deceased was on the ground, is it not conclusive that he had it not? True, Mr. Weir says that when he was down, the defendant was making blows at him with the stick; but where was that witness at the time? Was he close by as were the other witnesses? No! he was at the opposite side of Broadway, either coming up or crossing, but still at a considerable distance. Is it likely that he saw as clearly as the others, who were close beside the parties? Mr. Weir saw him strike before the deceased fell down, and confounds that epoch with the time when he was down. Mr. Haycock was walking up Broadway with two customhouse clerks, who were going to their dinner; they were on the opposite side of that wide street; and can you conclude from their testimony, that what those immediately present tell you is not true?

I have now stated all the evidence as to that fact. Six of these witnesses, equal at least in intelligence to those opposed to them, whose opportunities of seeing were much better, swear positively, that when Mr. Stoughton was down, Mr. Goodwin had *not* the dagger in his hand. One witness is *doubtful*, and two say *he had* it. Will you rely upon those two who were running across Broadway, and disbelieve the six who stood close by? I have, I think, fairly stated all the testimony. I have wished to disguise nothing, to conceal nothing; and I ask you now, as honest conscientious men, upon which side you find the weight of evidence? Before the fall of the deceased, I admit the prisoner had the dagger, but immediately after he had it not. No doubt, then, it got entangled in the clothes of Stoughton, he fell upon it, and to that was owing the unfortunate catastrophe.

One witness only (Mr. Haycock) pretends to say, that as Mr. Stoughton was falling, Mr. Goodwin continued striking him with the handle. If that witness was to be believed, still it would follow that he never could have given the wound. He was holding the dagger this way: (with the point towards his own body.) He must then have put it out of his hand when he was about to fall upon the top of the deceased. If he did that, and Stoughton fell upon it,

either in consequence of his so dropping it to secure himself, or if it was in some other manner that none of us can clearly explain, you are bound to acquit, for you should never convict of so grievous a charge upon uncertain testimony.

But, gentlemen, two, I think, of the witnesses say, that in their opinion, they saw the blows that Mr. Stoughton received from Mr. Goodwin; that they were not heavy enough to knock him down, and that they were surprised to see him fall; from which it will be inferred, that this wound was the cause of his fall, and was given of course before he fell. I have shown that it must have been given, if that were so, before numerous spectators, who could not but have seen it; but remember the testimony of Mr. Cambreleng, that the instant before the deceased fell, he had stepped back off the curbstone and tripped, and Goodwin, following close and quickly after him, may have occasioned the fall. If Mr. Cambreleng is to be believed, and no man is entitled to more credit, Mr. Stoughton must have tripped, and that, together with the strokes, must have caused him to fall down.

And, gentlemen, as it is my wish to give you a full and fair view of all the evidence, without the least inclination to mislead your judgments, I feel it my duty to observe upon the testimony of Mr. Weed, when called up yesterday. He says, that before Stoughton got up, he saw the dagger lying about a foot from his body; from which it will be argued, that inasmuch as he was then lying upon his back, he could not have fallen upon this dagger, it lying then at some distance from him. This I must endeavour to explain and get rid of. That witness says, that the crowd collected, and he could not afterwards see distinctly. He may then well be mistaken. It shows, at all events, that the dagger was on the ground, and did not remain constantly in his hand, and renders the subject only more doubtful and perplexing: and if a doubt once rises in your minds, whether Mr. Weed may not have been mistaken in this evidence, instead of weighing against, is in favour of the defendant. The whole thing did not last half a minute. Mr. Weed thinks he saw the dagger, when Mr. Stoughton lay upon his back, upon the pavement. But from the time when he first fell, and even before it, Mr. Weed tells you himself, that he had not a distinct view of the parties. Is it not then possible that he may have seen the dagger on the ground the last time, it being then more likely to impress him? and he has transferred the epoch by effect of his imagination, and mistaken one moment for another. But Mr. Clark stood between the combatants, exactly alongside; must he not have seen the dagger if it was there? Is it not then possible that Mr. Weed may be mistaken, but mistaken merely and only as to the period when it was visible to him? Allow, then, that he may have been mistaken as to the moment of time, and then the fact of the dagger being seen on the ground, gives strong probability to its having happened as I state: because it shows at least, that the dagger was certainly, at one time, out of the prisoner's hand, however it came into it again.

He remained for a time, not knowing what had happened. He walked down Broadway, and not till it is reported to him that his adversary was a dead man, or said to be so, does he think of stirring; and then he consults his friend, who advises him to withdraw himself from the scene. Mr. Cambreleng tells him at first that it is not necessary to leave the city, for he does not think that Mr. Stoughton could be materially hurt. But "did you not hear a person say he was a dead man?" Yes, says his friend, and perhaps therefore you had better go. He then walks to the Elizabethtown steamboat. He arrives at that place about five o'clock, and continues there, in a public house, two, three, or four hours, without any attempt to get away.

Now, gentlemen, he was in a post-town, through which the mail travels. He might have gone in it to Philadelphia, and it would have been impossible ever to have taken him. When the officers came, his first question is "how is Mr. Stoughton?" They tell him he is dead, and that they are come to take him. He knows they have no power to take him out of that state; but he says, I will surrender myself to the laws of New-York, and depend upon a jury to acquit me. Was this the conduct of a murderer? Or is it not the strongest evidence that he did not know or think he had done the act?

It may be asked, do you not then attribute blame to this man? I do! But is there no difference between the want of discretion, and the guilt of a felon; between thoughtlessness and crime; between that blame which attaches to every act of imprudence, and that guilt that consigns a gentleman to the state-prison and to infamy? He ought not to have uttered the words he spoke. He ought not to have done the act he did. But neither should you send him to the state prison, if he is not guilty of the felony of which he here stands charged. He has done what was wrong, it is true. But God knows he has suffered enough. For three months he has lain in gaol; his reputation blasted in the eyes of many, and of some, perhaps, forever. I say nothing of the many sleepless nights that his imprudence has caused to a venerable parent and a lovely sister, whose hearts have, and do still cling to him, as the object of their tenderest affection and their fondest hope. God knows he has suffered abundantly, and he must be relentless indeed who would make him suffer more.

You are told this crime has been committed in the public streets, and that it is due to our community to make of its author an example! But I entreat you that you do not immolate an innocent victim for the sake of an example. And I trust you will not. I will hope that notwithstanding every effort out of doors to prejudice the individual, and forestall the opinion of his jurors, that nothing has found its way into that box where you are arrayed but righteousness and mercy: that you will proceed, regardless of all that you have heard, *but from the sworn witnesses:* that you will set no other, since you can set no better example, than that of administering pure and impartial justice. I cannot but hope, what I so earnestly desire, that the history of this cause may rectify the public

feeling, and give a useful lesson to prevent in future such practices as are disgraceful to us all, and amongst others, that of holding a man up in public papers as a culprit or a convict, before he has been tried. This ought to be put down, or no man in our community is safe. Mark, gentlemen, how these abuses operate. In the first moment of excited feeling, a coroner's jury found this *wilful murder*. When the public opinion had but a little time to cool, and men could form a more deliberate judgment, a grand jury, hearing but the inculpatory side, found it *manslaughter*. And now, I hope, when all these prejudices have passed away, from the minds at least of those who have heard the testimony, you will not shrink from your duty; but that you will have nerve to say, the prisoner is innocent, and to acquit him altogether. I ask you not for mercy. I ask for justice, and cannot brook the thought of asking it in vain.

EMMET *followed Mr. Ogden in Summing up for the Prisoner.*

Gentlemen of the jury, if I could entertain a thought, that by any thing which may fall from me on this occasion, I might advance my personal reputation, I should only cherish a vain and idle expectation: if my mind were occupied with any thing so light, I should shrink from a comparison with those able associates who have preceded me. Still I am not discouraged from entertaining the hope, that in the exercise of my professional duty, I shall be able to add some observations, though not of equal force, yet somewhat conducive to the success which we all desire; but which I desire with different expectations from those which have been expressed by one of my associates. I know and feel that there is at stake in this trial, that, which if lost, will bring ruin on my client, and spread desolation over a numerous, amiable, and respectable family. But whether it be that nature has given to me a more sanguine and enthusiastic disposition than to others, I know not: I must confess, however, that I address you with strong and ardent hopes. And if I can instil into your minds but half the conviction I feel of my client's innocence, his acquittal is secure.

The district attorney, in stating to you this case on behalf of the prosecution, said, that the excitement produced by the lamentable event which has caused this trial, did honour to our city. He spoke truly; but he must admit that it has formed a frightful impediment to the due administration of justice. It was honourable to our community, because it bespoke universal horror at the atrocious crime imputed to my client: but there is another feeling capable of doing still greater honour to this city, the noble renunciation of prejudices and antipathies, formed with precipitation and error, and discarded under the influence of cool investigation and deliberate inquiry. I rejoice to perceive how rapidly they have disappeared amidst the vast assemblage who have listened to this trial, as the testimony became developed; and assuredly it will redound to the honour of this community, to find that an unprotected stranger, against whom every arm was nerved, and every voice was raised under a belief of his guilt, can safely commit his dearest in-

terests (unknown and unprotected as he is) to a jury, taken from that incensed community, and receive from their patient attention and examination of his case, his own acquittal, and a recantation of those preconceived opinions, which seemed calculated to overwhelm him in disgrace and ruin.

And indeed, gentlemen of the jury, I should not indulge in the expectations I have avowed to you, if I did not believe I was addressing men who will not suffer any thing to sway their minds but the testimony and the merits of the cause; who, when placed in that seat of justice, will shake off and cast behind them all those rumours and prejudices which have hitherto preoccupied the public mind: and which, I must confess, took possession even of myself. For when I first heard of the dreadful calamity which closed the life of Mr. Stoughton, I partook strongly of that excitement which agitated the whole city: but I had not conversed one half hour with my unfortunate client in his prison, till I felt a conviction, which has ever since continued gaining strength in my mind, that he is free from reproach as to all criminality of act or intention. And it is, because I think it impossible an intelligent jury can be led, on due consideration of the evidence, to arrive at a different conclusion, that I so confidently hope that the hour of his deliverance is at hand.

Gentlemen of the jury, as by the constitution of this state it is your part and your duty to form your own conclusions of law as well as of fact, in every criminal case, so it is my duty, with the most entire confidence nevertheless in the court that presides, to lay down the law applicable to the evidence, as well as to comment upon the authorities cited by my adversaries. And in doing so, to prepare your minds for a more accurate examination of the evidence which I have to discuss.

The first doctrine I have to remark upon, is the position insisted on by our adversaries, that the burthen of the proof is placed upon the prisoner. This position is founded upon an authority which I shall endeavour to explain, and to repel its application to this case. It is found in *Foster's Crown Law*, p. 255, as follows: "In every charge of murder, *the fact of killing being first proved*, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence against him; for the law presumes the fact to have been founded in malice, until the contrary appeareth." That, gentlemen, is a doctrine I do not mean to question; but the application of it seems to me to be strangely misunderstood. The rule of law supposes a thing which the writer intended not to be overlooked, for he has caused it to be printed in italics, "*the fact of killing being first proved.*" It is not because a death is proved to have taken place, that any man who is accused is put to the necessity of proof, until the act of killing *by him* is first established: and why? 'for the law presumeth the fact to be founded in malice till the contrary appeareth;' that is, the fact which the evidence establishes to be his act.

But before the law will raise any presumption against any man for any act, the doing that act must be first proved against him.

There is also another qualification: "unless the circumstances, &c. arise out of the evidence produced against him."

We have examined but one witness as to the facts; he has not given a new character to the circumstances which were detailed by those of the prosecution. On that ground, therefore, no burthen of proof is thrown on us; but you are to draw the natural inferences from the facts stated. But what is the true meaning of the rule itself? An indictment avers facts, and states an inference from these facts: when it says that a man committed the crime of killing a person with malice aforethought, then it is an indictment for murder; and in that case you are not bound to prove the malice aforethought, *if you prove the killing by the party accused.* Then it is that it lies upon him to prove the circumstances not averred, but which, when proved by him, are competent to rebut the first presumption, and to alter the character of the transaction—but the law never intended to say that any part of this presumption or of this rule, is to dispense with clear, sufficient, and adequate proof of the facts laid in the indictment. And, gentlemen, the first ground we take is, that the evidence did not warrant the conclusion that the death of Mr. Stoughton was occasioned by any act of the prisoner; however unexplained it may be by him, or inexplicable by those witnesses who, though they were present, yet were too much agitated to see distinctly. But till the killing is first proved by competent testimony, in the manner laid in the indictment, a jury is not warranted in drawing any inference. My associate counsel has truly told you, all that you are to try is to be found in the indictment: it is your text book: it was, therefore, read to you when the prisoner was given to you in charge. Let us therefore refer to it: it states that Robert M. Goodwin, in the peace of God and the people, in the fury of his mind made an assault, and that he made that assault with a certain drawn sword, which he in his right hand then and there held, and that he gave him with that instrument so held in his right hand, a mortal wound near the ninth rib. It states that he with the said sword did thrust and penetrate his body.

Now, gentlemen, there may be, and there are averments in that indictment, which are not essential to constitute the crime, and their proof may be dispensed with; but the truth of every fact material to constitute the crime must be proved as laid, or must be a necessary consequence from facts which are proved. You have no right to extend the accusation, and say that he is guilty of any other thing but that which has been given to you in charge. Let us then see what averments in that indictment are essential and necessary. I do not mean to mislead you by saying that certain parts of this record may not properly be considered as mere formalities; but I must confidently say, that these parts are essential, and the proofs of them indisputable: first, that he made an assault upon James Stoughton: and that term assault is to be understood in the legal ac-

ceptation of the word. I admit that if one commits an excessive outrage upon another who has first assaulted him, and kills him, that is an assault within the term of the indictment; but if there is not an excess on the part of the prisoner, nor any other act, such as, if he were indicted for an assault, would be sufficient to convict him, the averment that he made an assault is legally falsified. Secondly, this, also, is essential in the framing of the indictment: that he, with a certain drawn sword or dagger, which he in his hand then and there held, him the said James Stoughton did stab, thrust and penetrate, giving to him a wound on some part of the body that will correspond, or nearly so, with the description in the indictment. By taking this indictment therefore as your guide, you will distinguish what you are to find and pass upon; but observe still further, you are not to find any of those facts, however properly charged, of the certainty of which you have a reasonable doubt; and as it is the business of the prosecutor to establish with certainty every fact he has averred, doubt alone gives to my client the right to his acquittal. You cannot satisfy your consciences by finding something, I know not what, but something that you should suppose nearly allied to the offence given you in charge. Exceptions to this rule were stated and referred to, in hopes of inducing you so to do. All the authorities relied on by our adversaries, are to be found in 2 *Chitty, Cr. Law*, 734. From them we can collect that an allegation of one kind of death is never supported by evidence of another essentially different; so that if it be alleged that the murder was committed by stabbing, and it be shown to have been by drowning or poisoning, the prisoner must be acquitted. This is the general doctrine: the exceptions are, that the particular species of weapon need not always be exactly proved: for instance, the allegation of assaulting with a staff, is proved by evidence of violence offered by striking with a stone in the hand; and an indictment for murder by one sort of poison, is supported by proof of murder by poison of another kind. But *the act of the party is always material*, and so far as relates to that, the cause which conduced to the death, must be always proved as laid. The instrument or the poison may be immaterial, because it makes no act of the party, and therefore some certain act done by him, if proved as stated, will maintain the indictment, though done with a different weapon; but in every instance the act of the party which caused the death must be proved as charged. Take the first instance, of the man charged with striking with a stick, and proved to have struck with a stone: In recurring to the original authority in 1 *East, P. C.* 341, it is manifest that it was a stone not thrown as a missile weapon, but held in the hand, and used as a staff to strike with. The act of the party is the same in both cases; and I may confidently say, there is no case where a conviction was ever had, if it was proved he struck with a staff, and it was charged to be a death occasioned by the *throwing* of a stone. It has been only when the manner of using the thing, or the nature of the killing, was identically the same. So it would make no difference if it were charged to be a poisoning with arsenic, and

proved to be with sugar of lead, or corrosive sublimate. It is his act that must be proved, and his act is the same in both.

The counsel here referred to several approved precedents of indictments, and read from them to show with what particularity the manner of the death, and the act of the defendant, was always laid, being the most material part of the indictment. See *Mary Blandy's case*, *Cr. Cir. Ass.* p. 293, which was a charge of poisoning, and the manner and contrivance of the defendant in laying the poison for the deceased, that he might take it in ignorance, is stated with great particularity; and see other precedents of like nature. *Ib.*

Now it is manifest that if the prisoner can be indicted at all, the only way in which this fatal accident can have taken place was, by the knocking or throwing of Mr. Stoughton down by Mr. Goodwin, when the dagger was on the ground. Let me then illustrate my position from the indictment just read. Suppose a man gives a shove to another, by no means calculated to cause his death, but that in consequence of that shove, he falls into a cellar and fractures his skull, or into a pound where he is drowned: would it be correct in either case, to say he gave him a mortal wound? Neither would it in this case. I repeat it, you may lay the act as far as concerns the weapon, with a certain latitude: but the act of the party from which death has ensued, must be described truly without any latitude whatever.

This principle then, if I have established it, is, in my judgment, entirely applicable and fully sufficient for the acquittal of my client, even though it should be believed that a homicide was committed by an unlawful act of his. Even supposing, for argument sake, that he was responsible for the act of shoving or casting the deceased on the ground, yet the indictment should state that the death resulted from that casting on the ground.

It follows, therefore, that under this indictment, Mr. Goodwin cannot be convicted, though you should believe that death was caused by the fall of Stoughton on the weapon, and that such fall was produced by an unlawful act of Goodwin, unless you believe *he gave a thrust or actual stab.* For though the law might, in that case, visit upon him the consequences of the illegal act, yet, under this indictment, he cannot possibly be convicted.

There is a doctrine which stands upon ancient and venerable authority, which has been in some respects questioned; but which for the purpose of my argument is, I think, established even from the discussions it has undergone: (2 *Hale*, 184.) where it is laid down that if the indictment charges that the prisoner gave a mortal wound, without saying that he *struck*, it would not be sufficient. A later author, Mr. *Hawkins*, seems to doubt of this, but let us see upon what authority: (*Hawk. Pl. Cr.* b. 2. ch. 23. § 82.) It is not safe, he says, to omit the word *percussit:* (that he struck) and by the authority of some books, he says, it cannot be supplied by stating that he gave a mortal wound: (*dedit mortale vulnus*) yet, in *Coke's Reports*, he adds, this doctrine seems to be questioned, neither do I find any particular reason why the word *percussit* should be of such

absolute necessity; for it is not pretended in the case (*Long's case*) which is the chief foundation of this opinion, that it is a word of art appropriated to this use: but all that seems contended for there is, that where the death was occasioned by any external violence, coming under the notion of striking, *it must expressly appear that a stroke was given.*" It is, therefore, clear, even from *Hawkins'* authority, that when a stroke is laid as the cause of the death, proof of a stroke is indispensable. The using of the words *strike* or *stab* may, perhaps, sometimes be dispensed with; but never the proof of a stroke or blow, if the death be charged to have proceeded from a stroke or a blow. And I therefore contend, that if the fact of the defendant's striking the deceased with that dagger, and thereby giving him a mortal wound, be not here proved, then this indictment is not proved, and no conviction can follow, even though the prisoner should be guilty of some other act which might, perhaps, be construed into an act of manslaughter. Until some act of striking is proved, either by direct evidence, or such combination of circumstances as make it a *necessary* inference, we are not obliged to take the burthen of the proof upon us. The public prosecutor has never reached that goal he proposed to arrive at, when he put that averment upon the record; and if he only left a doubt upon your minds, whether there was a stroke, and has not altogether satisfied your judgment and your merciful consciences, and your oaths, on that subject, then he has not yet put us on our defence.

But, gentlemen of the jury, there are other principles more important to the character and reputation of my client, which also conduce to his acquittal. I began by saying, that in every act of manslaughter, the act of the party causing the death must be a *voluntary* one. And I wish this position to be accurately taken down, and marked and understood by you all, because to me it seems clear as demonstration can make it, that manslaughter cannot be committed, unless the act which caused the death was voluntary. If I doubted as to my own correctness on this position, I should derive infinite confidence from the definition given by *Judge Parker*, on the trial of *Selfridge*, p. 158, that the crime of manslaughter consists in the unlawful and *wilful* killing a reasonable being, without malice express or implied, and without any reasonable cause. The act then must be *wilful* as well as *unlawful*. One may kill another wilfully and be innocent: the act occasioning the death may be unlawful and he may be innocent: but this definition so coupling these terms, is one that is perfect and never can be shaken.

But let not the word *wilful* be misunderstood. What then, it may be asked, is its meaning? I say, proceeding from the will of the party. I admit the death may be manslaughter, though it happened in consequence of an act by which the accused did not mean to cause death; but it must be a *voluntary* act, whatever its consequences may be, before it can render the party guilty of manslaughter. Where any part of the system of our law has a relation to, or connection with another, the parts so connected are mu-

tually strengthened and confirmed; I therefore support this doctrine by recurring to an authority I have already cited. When it said that the words strike or stab must be laid in the indictment, it is meant that it may be put in issue whether the defendant did that unlawful and *wilful* act of striking or stabbing. That, then, is the meaning of the definition by Mr. Justice *Parker*, in which the law is thus briefly expressed, that manslaughter is the unlawful and wilful killing, &c. though without malice either express or implied. And I go farther and say that this is, without exception, the doctrine which must be deduced from every English case that has or can be referred to. To prove this, I the rather take the cases which the learned counsel opposed to me have cited, because I am bound to presume and do presume that they are selected with the greatest care and judgment in their own favour.

(Here the *mayor* asked *Mr. Emmet* whether he had found in any book of authority that the word wilful was held essential in the definition of manslaughter—to which *Mr. Emmet* replied that he had: he cited the words of Judge *Parker*, and only added this commentary of his own, on the word wilful, that it must be the voluntary act of the party killing. He then proceeded.)

The first case cited merely went to the distinction between murder and manslaughter. It is said in 1 *Hale, P. C.* 475, that if A throw a stone to kill the poultry or cattle of B and the stone hit and kill a bystander, it is manslaughter, because the act was unlawful, but it is not murder. God forbid, I may add in passing, that it should be held so here, where it would inflict upon the party the dreadful penalty of the law; and I must confess that from my earliest studies in the profession, I have never ceased to regard this doctrine with horror, when such a case is put as that of a boy shooting playfully at a bird on the road, and unintentionally killing a man, a stranger against whom he could have no malice, or his playmate, or his brother, and he is adjudged to have committed manslaughter. Though I admit it to be the law of England, yet I have never read the position without shrinking into myself. In that case, however, the act of the boy was voluntary—he intended to shoot; the killing was by an act he intended to commit, though he never calculated the consequences of that act to be the death of another. In the case of Ward, the boxer, (1 *East*, 270.) Ward intended to hit the blow, although he never thought that death would follow from it. So in Sir *John Chichester's case*, fencing in sport with his servant, who probably might have been reared up with himself in habits of familiarity from early youth, and whom, to use Lord *Hale's* words, he very well loved, from the accident of his scabbard's being stricken off by his servant, the point of his rapier accidentally wounded his groin and Sir John was found guilty of manslaughter. This, to all human feeling, must appear one of the harshest cases in which technical subtlety ever prevailed to overwhelm a wretched man, and afflict the afflicted. But still it confirms my position: for there the defendant intended to make the thrust; and though he did not intend the death, it was his undoubted and voluntary act that caused

it. In *Snow's case*, the boy who committed the crime had come home intoxicated and insulted his father. His brother threw him down and gave him some blows; he drew his penknife, and without intending to cause his brother's death, but indulging his passion, he intentionally used his knife for the purpose of making a stab at his brother. Indeed, without going through the tedious range of all the authorities in the English books, I will venture to affirm, that there is not one where the wilfulness of the act did not enter as an ingredient into the crime of manslaughter. I shall now allude, in confirmation of this position, to two cases stated by *Hale*, referred to by *Mr. Hoffman*, and also cited by the opposite counsel; but which did not, according to the intimation of the court on yesterday's argument, go as far as we could wish. While I now read the passage in 1 *Hale, P. C.* 480, I request you to observe that there are two situations contemplated in this statement: First, A assaults B, who flies to the wall, holding his sword, knife or pike in his hand; or falls, holding his sword, knife or pike in his hand; A runs violently upon the knife of B, without any thrust or stroke offered at him by B, and thereupon dies: this is death by misadventure, (*per unfortunium.*) Where is the difference of principle, or even of circumstances, between one of the alternatives put by Lord *Hale* and this case? A assaults B, who falls, holding his sword, knife or pike in his hand. A falls on it without any thrust or stroke offered at him by B, and thereupon dies: this is death by misadventure. The principle does not depend upon B's actually falling; but upon A's falling on the sword, without any thrust or stroke offered at him by B. Neither does the principle of that case in any respect turn upon any part of the law of self-defence; for then Lord *Hale* would have said it was a case of *justifiable homicide*, and of a nature entirely distinct from misadventure, which is only excusable. The falling of B is only mentioned to manifest that the wound must have been unintentional; and the first assault by A, and B's retreating to the wall are only mentioned to show that B was doing no wilful act; but the true state of the case was, that the one party merely held the weapon on which the other fell. And it proves all I say, that if in a casual rencounter one party meets his death, but without thrust or stab given by the other, or voluntary act causing the death, it is misadventure. To say that one held the sword and the other ran on it, is no more than to say, that if there is no intent in the party to do that very act which caused the death, it ceases to be manslaughter, and becomes misadventure. It is true it is the person assaulting that has met with the misfortune, and such was also the fact in that instance; but on the subject of manslaughter it stands on equal footing in the law, whether the assaulter or the assaulted fell, though in murder it is different: the making of the assault is then material; but when the thrust or stab has never been given, nor the death arisen from a voluntary act, it cannot be manslaughter, and must be misadventure. So in page 493 of the same book; if B having a pitchfork in his hand, A assaults him so fiercely that he runs upon the pitchfork, B offering no thrust at all against A; though

this be a very difficult matter to suppose, yet, if the fact be supposed to be so, he says, B *forfeits no goods*, because it was the act of A himself; and some have said rather that in that case A is *felo de se*. This case also keeps up the uniformity of the principle, that manslaughter must be by a voluntary act; and though for every voluntary act he must abide the penalties of unforeseen and unintended consequences, yet he is not to answer for a misfortune not occasioned by any act of his. Now let us see (the cases being disposed of) whether I am not based upon a still more solid principle than book authority. Does not justice require that the act causing the death should be voluntary? For God forbid that he who had no criminal intention should suffer for a crime. If the words found in the indictment, "in the fury of his mind," are meant to distinguish the act from a mere casualty, surely the construction should be at least that the act should be voluntary.

The doctrine I am contending for is the law of England, and deduced from English authorities; but it is infinitely more important to insist on it here, than it could be in that country, for there the punishment of manslaughter is discretionary with the court; but here it must be at least three years imprisonment in the state prison. If I were pleading for my client at an English bar, I should probably not deem it material to his interests, that I should dwell upon the position I have just advanced; because from the gradual alteration of times and opinions, which would protect him from a forfeiture of goods, it would be little worth the pains of any English lawyer, having once established that the casualty was not imputable to him, to cite cases or argue very strenuously for an acquittal. His client would, upon conviction, be fined perhaps one shilling, confined one day, and then discharged. For what reason I do not know, but the fact in this state is, that all discretion in the punishment is taken from our courts of justice; and my client must, if convicted, inevitably be sentenced to a punishment more bitter than death to a man of lofty feelings and honourable character, nurtured and bred with sentiments worthy of his station in life.

When it appears from certain acts of the legislature, that every man found guilty of manslaughter should be sentenced to the state prison for three years, should it not also be inferred, that the legislature meant nothing inconsistent with reason and justice, and that those were not to go for three years to the state prison, whose offence was not deserving of such a punishment. If it made the law, it gave the construction, and must have meant that no man should be so punished for an act free from criminal intent. Even in England, in those cases where the degree of the offence is regulated by the standard of property, you will find the most austere judges instructing the jury that they are authorized to find the property of less value than every living being knows it is, and they thus rescue the victim from a punishment which their humanity tells them is beyond his guilt. Am I wrong then in saying that your oaths should bind you to the very strictest investigation of the evidence according to my principles; and your consciences should not yield to any thing that

does not bring demonstration home; and that therefore you will stop and see whether the testimony compels you to believe that the dagger was not on the ground at the time of the fatal mishap; and that the prisoner did more than hold it in his hand, without the slightest intention of doing an act that could contribute to the death? But if you should go farther and believe with me, that in truth the weapon, at the time of the accident, was lying on the ground, and that in the course of the conflict Mr. Stoughton tripped or fell, and in so doing received the mortal wound, how much more conclusive are my arguments!

These considerations, if you feel them with the force that I do, will supersede the necessity of all further discussion, and put an end at once to the prosecution, whether Mr. Goodwin's conduct in the conflict was unlawful or not: for if the essential thing is wanting, if it was not a *voluntary act*, then the unlawfulness alone can never make it amount to manslaughter.

The definition of manslaughter cited by the opposite counsel from *Hawkins*, b. 1, c. 20, § 1, is, in a technical sense, correct; but I shall render it more exact to the minds of men not accustomed to legal discussions, by recurring to Lord *Coke* himself for the definition. (3 *Inst.* 56.) He says: "There is a homicide which is neither aforethought nor *voluntary*, as if a man kill another by misadventure or accident." And here let me, in passing, remark, that the very division of his subject adopted by Lord *Coke*, "homicide, which is neither aforethought nor *voluntary*," (i. e. which is neither murder nor *manslaughter*) very strongly justifies the insertion of the word *wilful*, by Mr. Justice *Parker*, in his definition of the latter offence, and exceedingly fortifies the position on that subject which I have already discussed. But to return to my argument. Lord *Coke* in the same passage proceeds: "And homicide by misadventure is, when a man doth an act that is not unlawful, which, *without any evil intent*, tendeth to a man's death." Now Serjeant *Hawkins* has substituted for these words, "*without any evil intent*," the words "*without any intent to hurt*." And he has, with little necessity, substituted the words "lawful act," for "*act not unlawful*." They surely mean the same thing, though the latter expression may convey the idea more accurately to your mind. Then to this definition of Lord *Coke* I will adhere, and to avoid the confusion that arises out of these words, *without any intent to hurt*, I shall say with Lord *Coke*, without any intent tending to the man's death. And then if the intention be not to do the act, and if the act be not unlawful, death arising from the two combined together can alone amount to manslaughter. The counsel on the other side may, perhaps, insist that to either of these definitions should be added this phrase, viz. *without due caution*. This has been often said, and I do not think it necessary for us to contend against it; but in admitting it, let me apprise you how you should receive it, by reading a passage from a most able criminal judge, (*Foster*, 263.) who says, "I cannot help saying that the rule of law I have been considering in this place, touching the consequence of taking or not taking due precaution, doth not seem

ciently tempered with mercy. Manslaughter was formerly a capital offence, as I shall hereafter show. And even the forfeiture of goods and chattels upon the foot of the present law, is an heavy stroke upon a man, guilty, it is true, of an heedless incautious conduct, but *in other respects perfectly innocent.* And where the rigour of law bordereth upon injustice, mercy should, if possible, interpose in the administration. It is not the part of judges to be perpetually hunting after forfeitures, *where the heart is free from guilt.* They are ministers appointed by the crown for the ends of public justice; and should have written on their hearts, the solemn engagement his majesty is under, "to cause law and justice *in mercy* to be executed in all his judgments."

Now, gentlemen, if the mere forfeiture of goods calls for this merciful administration of justice; if this respectable judge thus speaks of tempering the rigour of the law, think of that terrible punishment that must follow upon your verdict of conviction. Temper your verdict also by that same mercy. You are not hunting after forfeitures of goods; but you are called upon to utter a fearful sentence, far more than forfeiture of goods; far worse to an honourable mind than death itself. You are not kings, nor bound by the oaths of kings; but you are bound by the precepts of the God you worship, as much as kings can be, to administer justice in mercy. That oath of the king, is only to fix in his mind the admonition of the King of kings, and which he gives alike to kings and subjects, who are equal in his eyes. It speaks only that command of God to man which is embodied in his oath, as a divine instruction to him and his people.

What is the nature then of this "due caution?" Where the lawful act is *deliberately* begun and carried on, there may be time for *caution;* and if it be possible to justify, before a jury of this country, a judgment like that against *Sir John Chichester*, it could be only upon this ground, that the killing was there in a dangerous kind of sport, which the parties had *deliberately* entered into; and then, perhaps, greater caution might be exacted. But here, the circumstances were such that the mind of the defendant could not be composed, nor could he be self-possessed; the rule as to him must therefore be taken with great latitude. Let us illustrate the distinction by supposing a case. If a number of persons go on a boating party, it is a lawful act in every person; if the vessel should be overset, each would endeavour to save himself, which is also lawful. All might be saved, if all were cautious and deliberate; they cling to the keel, but one in his flurry shoves another off, who is drowned—would you sentence him to the state prison for three years, and give him as a reason, that he had not used *due caution* in his exertions for himself? You could not do so; every merciful consideration would warn your consciences, that in such sudden emergencies no man is competent to the exercise of "due caution," nor master of the ordinary powers of his mind. The conclusion from this illustration is, that where the act takes place under circumstances which naturally destroy all self-command, the

rule touching observance of due caution will receive a very large and liberal construction. But here I may passingly observe, that a caution greater than perhaps would be expected on such occasions, was manifested by this unfortunate prisoner, when he took the blade in his hand, and struck with the handle of the dagger in the manner described by Mr. Cambreling.

I have now, gentlemen, stated to you the general principles of the law of homicide on which we rely; and before I examine the facts entering into the merits of this case, let me advert to a piece of testimony which, under that law of homicide, I think should not have been introduced at all. Major Smith was examined to prove that the prisoner procured from him the cane unfortunately containing the dagger which gave the wound, but the evening before the affray. If that fact could afford any inference, it could only be to affix a charge on my client, from which the grand jury have absolved him, and which you are not to try—from which he is not called upon to defend himself, and which he may well be unprepared with evidence to explain. But, gentlemen, that inference is most strained and uncharitable, and such as should never be applied to human actions. Two gentlemen, friends from childhood, met under circumstances of conviviality well calculated to exalt their mutual attachment, and expected to separate again in a day or two, perhaps for ever. The stick happened to catch Mr. Goodwin's eyes, as Major Smith held it on a chair, in a gay and unimportant conversation. Both had sticks not unlike each other, and my client proposed to exchange them as mutual keepsakes. Major Smith says it was done after a few words; that it was understood between them, the exchange was only made as a memento; and he did not know, that when Mr. Goodwin proposed the exchange, he was aware there was a sword in the witness's cane. If this is to be urged as a proof of deliberate and premeditated malice, what man can guard the most inconsiderate and thoughtless actions of his life, from the foulest and most terrible construction? It would be unworthy of a jury to bestow on it a moment's deliberation; and particularly as it has no relation to the issue they are sworn to try.

In considering the facts really connected with that issue, the first question that presents itself is, was the act of Mr. Goodwin in his conflict with Mr. Stoughton lawful? or, to continue the use of the expression I have already adopted, can it come within Lord *Coke's* definition as "no unlawful act?" To decide this, consider it without adverting to that fatality which ought to have no influence on your minds in judging of the act itself, and which could only mislead you in determining on its legality or illegality in the abstract. Suppose the prisoner was defending himself on an indictment for a mere assault and battery, or in a civil action by the plea of *son assault demesne*: that is, that he was first assaulted by his adversary. This is the fair way of judging, as there is no law peculiarly applicable to manslaughter in this respect. The legality of Mr. Goodwin's act is to be judged of simply upon this ground; whether, under the circumstances of the case, he could be found guilty of hav-

ing committed an assault and battery. The opposite counsel endeavoured to elude this test by citing authorities which are totally inapplicable to manslaughter. They refer to *East's Cr. Law.* vol. 1, p. 239. where, speaking of homicide from transport of passion or heat of blood, the writer says, "In no case, however, will the plea of provocation avail the party, if it were sought for and induced by his own act, in order to afford him a pretence for wreaking his malice. As where A and B having fallen out, A says he will not strike, but will give B a pot of ale to touch him; on which B strikes, and A kills him: this is murder." This authority is applicable exclusively to cases of murder, and has no reference to the law of manslaughter. It is grounded upon the crafty words used to evade the law, "I will give you a pot of ale if you will strike me," that show the previous and premeditated malice which is an ingredient of murder. But it has no application to a case of manslaughter, where malice is not at all the question, and where the act stands simple and alone. So in 1 *Hale*, 457: "A and B are at some distance: A bids B take a pin out of the sleeve of A, intending thereby to take an occasion to strike or wound B, which B doth accordingly, and then A strikes B, whereof he died: this was ruled murder. First, because it was no provocation when he did it by the consent of A. Second, because it appeared to be a malicious and deliberate artifice, thereby to take occasion to kill B." I therefore, gentlemen, set aside these and any other authorities concerning previous provocation, as relating to murder only, and not to manslaughter; and then I contend, on the general principles of the law of assault and battery, that the provocation alleged to have been previously given by Mr. Goodwin to Mr. Stoughton, cannot make his subsequent conflict unlawful. There is no doubt but that the deceased struck the first blow; for though Mr. Clark did not see it, Weed and Cambreling did; and the district attorney, with that candour which has marked his proceedings throughout this cause, admitted the fact. It is enough for me then to say, without coming to the express definition of a "lawful act," under the authority of Lord *Coke*, that the prisoner's conduct was *not unlawful.*

Our adversaries, however, dispute this position, and contend, that, in the eye of the law, Mr. Goodwin committed the first assault by the pointing of his cane towards Mr. Stoughton; and for this they cite *Hawk.* b. 1. c. 62, § 1. "It seems that an assault is an attempt or offer with force and violence, to do a corporal hurt to another; as by striking at him with, or without a weapon, or presenting a gun at him, at such a distance to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it, or by holding up one's fist at him, or by other such like act done in an angry threatening manner." But, gentlemen, the doctrine there laid down is totally inapplicable to this case. The acts there specified were held to be assaults, because they were attacks upon the safety of another; they were intended for the purpose of committing personal violence, and begun and proceeding towards personal injury. But here, the pointing of the cane was no more an assault than the pointing of the finger. It was an in-

dication of the person, and nothing more. Let me remind you also, gentlemen, that in such a solemn proceeding as this, the defendant is entitled to the benefit of the legal definition of the offence charged upon him in all its parts and strictness. If the provocation appears to you, as I fear it must, to have been wrong, fully as I admit it, and deeply as it is regretted by my client more than by any other person, who with a contrite heart says through me, would to God it never had been given, nor the terrible consequences followed from it; yet neither that contrite admission of the party, nor the lamentable consequences of the act, are to deprive him of the benefit of the law in every shape. And the law says, that the pointing, not being with a view to a battery of the person nor to any personal violence, was no assault; for that the intent of violence is a necessary ingredient to constitute an assault.

But that transaction, whatever may have been its character, was ended. Mr. Goodwin had gone on his way, as also had Mr. Stoughton; and with respect to the consequences of that act, all was past and over. The returning and following of Mr. Goodwin by Stoughton, was a new and distinct act, which should be entirely separated from the former in your consideration. If Mr. Goodwin had been the person slain, and Mr. Stoughton the person upon trial, he never could have availed himself of the defence, that his striking Mr. Goodwin was lawful; and if he could not so avail himself, though the calamitous accident has changed the situation of the parties, the act of Stoughton must still continue unlawful; it therefore follows of necessity, that the resistance to it, and the conflict ensuing upon it, was "*not unlawful.*" And, in truth, that case, where one said to the other as an excuse, "take this pin out of my sleeve:" would apply to Mr. Stoughton with all its severity, if he were upon trial, and not to Mr. Goodwin. I should be sorry to see such severity of construction administered at all; but, if it were, it could be only in respect to Mr. Stoughton.

It has been intimated that Mr. Goodwin's continuing the conflict after the deceased began to retreat, was unlawful, and gave that character to the subsequent events. I cannot, however, conceive that your verdict will ever sanction this doctrine. In *East's Crown Law*, v. 1. p. 239, the author, after observing that the punishment inflicted on any sort of provocation, must not greatly exceed the offence received, adds: "This has been urged with caution; because, in cases where the mercy of the law interposes in pity to human frailty, it will not try the culprit by the rigid rule of justice, and examine with the most scrupulous nicety, whether he cut off the exact pound of flesh." What was the duration of this affray, which, it has been intimated, Mr. Goodwin continued too long? perhaps not half a minute at the utmost. Two or three blows passed on each side in an uninterrupted scuffle; Mr. Stoughton retreated, not because he wished to give up the contest, but because he found his adversary somewhat stronger than himself; and, perhaps, in order to regain a vantage ground. Is such retreating, accompanied with persevering assaults and blows, sufficient to pre-

vent a man from using violence to repel the continued violence of an aggressor, and for the purpose of self-defence? Where was the disposition of Mr. Stoughton to discontinue the conflict? When did he cease to attack the prisoner, or renounce the original purpose with which he commenced the assault, while he had the capacity to carry it into effect? Mr. Clark says, though perhaps somewhat mistakenly, that after the deceased rose up, he actually struck the prisoner. Mr. Phelps and Mr. Cambreleng say, he appeared determined to renew the attack; and Mr. Weir says, he made an effort to do so. This evidence is, I trust, sufficient to prevent the inference that Mr. Stoughton had given up the conflict, or that the prisoner was bound to suppose he intended doing so.

Mr. Goodwin is further charged with striking Mr. Stoughton when he was down. Permit me to say, that that fact has no relation to what you are to try, unless so far as it affords an inference favourable to my client. Favourable indeed it is, because, as I shall hereafter show, it proves how both his hands were employed at the time he is said to have stabbed his adversary; and also, because it shows an unconsciousness of what had taken place. But remember, gentlemen of the jury, you have no evidence before you: and, I trust in God, the wide range of this earth could not produce the evidence, that Mr. Goodwin was that abandoned wretch who could have continued beating a man in the face, to whom he had already given a mortal wound. Would to God it had not—that no part of this tragedy had taken place; but it must serve at least to show that he never could be conscious of having stabbed his antagonist before that moment; and then, or after that, he certainly could not do it, since whilst his hands were both employed about his adversary's face, he could not then plant a dagger in his heart.

This brings me to the notice of a question asked of a witness, as if to make it testimony in the cause, perhaps without intention. But it was asked, "is not Mr. Goodwin a military man?" For what was that asked? Was it to exhibit him to you, gentlemen of the jury, as a skilful assassin? Is that an attribute belonging to your army? Was it in that quality your soldiers marched against your enemies, and fought the glorious battles of their country? Is that sarcasm applicable to your forces by sea or land? Does it come properly from one who owes, perhaps his existence, certainly his safety, and his present tranquil enjoyments, to the fatigues, the privations, the sufferings, the virtues and heroism of that army? If my client was a military man, was it in that school of valour and honour that he could acquire the dipositions of an assassin? Did he learn to be so in the battle of New-Orleans, in that conflict so glorious to our warriors, and fatal to their foes? Did he learn it fighting any where in the defence of his country, as our soldiers always did, openly and face to face with their enemies? Was it in any of those exertions of body and of spirit, by which a foreign foe was gallantly combatted, and nobly driven from our shores? What could he have learned in that school, inconsistent with the character of a gentle-

man, and the honour of a soldier? He certainly would have learned there to meet his enemy in the most deadly combat, and face to face, whenever the necessities of his country and the duties of his calling should require; but if he is a military man, there is a nobleness in his occupation, which, in itself, should check the surmise, and silence the whisper that he could be an assassin. It may, indeed, have given him too exalted notions of what are called the laws of honour, and may have led to his using those words of provocation, and those slaps of insult, which both he and I deplore; but most assuredly, it never taught him to use a sword or dagger in any secret, base, or hidden manner, to work the death of an unarmed adversary.

Let us now, gentlemen, examine into the circumstances of those blows. I have said, they were only intended to affront or degrade, and not to inflict any injury by personal violence. I need not give a stronger proof than the bare fact, that Mr. Stoughton was lying on the ground when he received them, and not in the attitude of defence, and yet they did not leave a mark or bruise. If the prisoner struck with force, when no blow he struck was returned or parried, the marks would have testified to the atrocity of the act. Whatever blows then were given, when Mr. Stoughton was on the ground, as they left no trace, so they were intended to leave none. But it is alleged, these blows were given with a cane, from which a dastardly intention of personal injury is inferred. On this subject there is a direct contradiction of the witnesses. Those who testify to that fact, and those who disprove it, however honest they may be, cannot both be correct, and you must, therefore, decide between them. In doing so, I think I can give you one unerring rule; wherever there is a contrariety of evidence, that statement cannot be believed, which leads to an impossible or an absurd conclusion. And I hope to satisfy you, that believing Mr. Goodwin struck Mr. Stoughton when on the ground, about the head, with the handle of the dagger, would necessarily lead to the absurd conclusion that Mr. Stoughton was not stabbed at all, and did not die of any wound; while believing that the blows were given only with the hand, leads to an easy and natural explanation of his calamitous death. So far, however, as relates to the acquittal of my client on this indictment, it seems to me, that in whatever shape this fact is put before you, it equally leads to the conclusion that Mr. Stoughton's death was accidental, and not effected by the voluntary act of Mr. Goodwin. If these blows were given by the hand only, either open or clenched, they show that the dagger was then out of his hands, and give great probability, if not certainty, to the conclusion which I am sure you are inclined to draw, that the death was occasioned by that dagger, when it was out of the prisoner's hands. But, suppose those blows to have been given with the handle of the dagger; the witnesses who attempt to testify to that fact, agree that when they were given in the face, the prisoner held the dagger (as he had done during the conflict, when standing up) by the blade, and struck with the handle. When then was the stab of the depth and direction described to

you, given with the point? That he had the blade in his hand, both before and after the fall, all the witnesses agree who testify to that fact, except Vervalen, who probably saw nothing; for he deposed to things that could not possibly have happened, and in contradiction to every other witness. Indeed, I observed a smile on every countenance, and yours amongst the rest, when he related his extraordinary vision. But, putting him aside, and reasoning on the testimony of the witnesses who say my client struck with the handle of the dagger when Stoughton was on the ground; let me ask when was that wound given which penetrated through the ninth and tenth rib, forward and upward, through the heart to the breastbone? If it were possible to conceive that fact to be established, it would put the acquittal of my client past all doubt, for it would place it upon the very extraordinary but very solid ground of certainty, that Mr. Stoughton was not stabbed with that dagger.

Now, gentlemen, see how the evidence stands. The opposite counsel must either renounce that part of their own testimony, on which they seem mainly to rely, or abandon the conviction of my client; for they are met by an insuperable difficulty arising from that very testimony. The prisoner held the dagger by the blade, while standing face to face engaged in the conflict, and using it upon the head of the deceased. Beyond a doubt, it was not *then* the wound was given. I anticipate indeed that you will be urged to believe the deceased fell, because he had been previously stabbed to the heart. This supposition, however, is not only entirely gratuitous, sufficient causes being otherwise assigned for the fall, but it is repelled by the constant employment of the prisoner's hands in fighting about the head of the deceased; by the impossibility of his inflicting the wound described, situated as the parties are proved to have been in respect to one another; by the position in which the prisoner held the dagger by about the middle of the blade; by the great notoriety and conspicuousness of movement which would have been necessary for changing the position of the dagger in the hand, and of the arm itself, to give any thing approaching to such a wound; and by the acknowledgment of all the witnesses that no one saw any such movement made. Besides, if the deceased had fallen, because his limbs and strength failed him in consequence of the stab, the fact would have been immediately obvious to the spectators. If the wound had produced its effect upon his system, and his muscular strength had been so entirely prostrated, he would not have risen and stood as if about to renew the combat till another syncope or fainting seized him. When the time came that the consequences of the wound on his frame became obvious and caused the failure of his strength, he fainted, and never opened his eyes but for a moment with a glare of fury, and then closed them for ever. Returning then to my argument on the conclusions to be drawn from the contradictory statements of the witnesses, I repeat my assertion; beyond a doubt the wound was not given when both parties were engaged, face to face, in the conflict, before Mr. Stoughton's fall: and they continued in that attitude un-

til he fell. When that event took place, Mr. Goodwin nearly lost his balance, and almost fell with him. If the witnesses are to be believed who assert that while Mr. Stoughton lay on the ground, Mr. Goodwin was using the dagger, the same evidence states that he held it in the same position, and used it in the same way over the head of the deceased. Most assuredly also it was not *then* the wound was given. The deceased lay upon his back, rather inclining to the left side. Where was the space (even if the prisoner's hands had not been otherwise employed) to permit the placing of that dagger under the deceased, the driving of it into that part of his body that most particularly rested on the ground, and withdrawing it again? The motion of the arm requisite for such an operation, must have been extremely conspicuous, and yet nobody saw it—Mr. Cambreleng saw his arm and yet saw no thrust. If then I am correct that the wound could not have been given while the parties were standing engaged in conflict—nor yet while the deceased was lying on the ground, you are inevitably brought to the time—the *only* time when the wound could have been received: namely, as Mr. Stoughton was falling, or fell; and then it could not have been inflicted by the voluntary act of Mr. Goodwin.

The prisoner, though he did not entirely lose his balance, yet still was falling along with Mr. Stoughton. Now let any man show me how the prisoner, holding the dagger by about the middle of the blade, always in front of the deceased, who was falling off from him backwards, and he himself staggering or falling forwards, could have inflicted a wound beginning near the back, splintering off part of one of the lower ribs, and penetrating ten inches forwards and upwards even to the breastbone, which it injured; and that without any of the spectators having seen the necessary change of the position of the dagger in the prisoner's hand, or of his arm, to inflict the wound! Let any man, even standing firmly, place himself in that position, opposite another, and try with a weapon of that length, and held in that manner, to inflict such a wound, and he will immediately perceive it is impossible. But when it is further considered that both were falling, and of course that the necessary physical force and firmness of position were wanting, it is, to say the least, incredible that the prisoner should not only have inflicted such a wound at that moment; but also have withdrawn the instrument again, (the deceased being on his back on the ground) regrasped it by the blade and recommenced his blows about the head of the deceased, thus twice changing the position of the dagger in his hand, and the position and direction of his right arm; and all this unperceived by any of the surrounding witnesses.

I have said that under those circumstances the necessary force and firmness of position for the voluntary inflicting of such a wound were wanting. Evidence has been produced that muscular strength would be adequate to the giving of that wound—but it is idle to talk about the sufficiency of muscular strength in the abstract. It can only be applicable to this or any particular case, by taking into consideration the position of the parties, and the situation of the

part, the strength of which is to be exerted. In this case, (if the wound be supposed to have been given by the dagger in the prisoner's hand) no momentum could have been given to the weapon, by imparting to it a velocity before the point was made to touch the body. The shortness of the human arm, the length of the blade, and the position in which the dagger must have been held and driven, to inflict, by a person standing in front of his adversary, a wound beginning near the back, between the ninth and tenth ribs, and going upwards and forwards through the heart to the breast-bone, show that if it could have been given at all, the point must have been applied to the back of the deceased without any antecedently acquired momentum or velocity, and forced through a part of one of the ribs, and into the body to the length of ten inches, by mere muscular exertion, commencing from a state of rest. The very skilful physician who examined the wound and dissected the body, influenced by these considerations, testified, that under all the circumstances of the case, he thought the muscular strength of a man would be inadequate to the giving of such a wound, and that it must have been caused by the fall, which alone could impart the force and velocity necessary for overcoming the difficulties. Other physicians, having no respect to the circumstances of the case, said they thought the strength of a man would be adequate to drive the dagger in so far; and to illustrate their opinion you must have observed them drawing back their arms, and then thrusting the dagger forward with the utmost velocity and force. I was stopped in my cross-examination of those witnesses, by which I wished to fix their minds on the situation of the parties, and the impossibility that the weapon could have been driven with that velocity and force; and perhaps I was rightly stopped; for I was told that it was your province to draw these conclusions. I ask you then to draw them now, and I entreat you to consider whether it can be supposed, or rather taken for granted against evident presumption, against mercy, against the character and reputation of the prisoner, that he exerted a force to which a very competent judge thinks, and I trust you will think, the muscular strength of any man would be, under those circumstances, unequal.

I therefore say and insist, gentlemen of the jury, that whichever set of witnesses you give credit to, you must arrive at the conclusion that my client must be acquitted. If his hands alone were employed about the head of the deceased when he was on the ground, the dagger was then out of the prisoner's hands, and the natural conclusion is that the wound was received by falling on it, or with it, on the ground. If you can believe it was still in his hands, and held thus by the blade through all the progress of the affair, Mr. Goodwin cannot be guilty of the crime charged in this indictment, for the death cannot have been occasioned by a stab with that dagger. Extraordinary and absurd as this certainly appears, yet it is a necessary conclusion, that the whole of the allegations about the mortal wound must be untrue, if this part of the testimony be taken as the truth.

But in this very singular case, more abundant in contradictions amongst honest men than I ever knew before, where witnesses speaking of the same thing differ so entirely one from the other, on what are you to rest? I might rely for my client on the uncertainty of proof on behalf of the prosecution. I might tell you that where you were in doubt you were bound to acquit.

There is, however, a surer and a safer guide for you than the tongue of any witness. The senses of men may deceive them, their memories betray them, their feelings, passions, and apprehensions may mislead them. But if there be any unerring fact, not to be altered by misapprehension or mistake, adopt that for your guide, and it will be a clue to lead you through the labyrinth. That fact exists, and though one rib may be mistaken for another, the wound itself, its situation, depth, direction and nature, are certain. On them I have endeavoured to fix your attention, and if you keep them steadily in view, they will give you as much certainty as the nature of this case can possibly admit.

That the cane was used in the conflict there can be no doubt; the weight of evidence, however, is, that the blow after which Mr. Stoughton fell was given with the fist. Mr. Clark clearly says so; Mr. M'Williams speaks as decidedly to the same fact, and says, that when he was running up, before the knocking down, the battle was with their hands. Mr. Baker also says the same thing. There is therefore much reason to doubt whether the prisoner had the dagger in his hand, even when Mr. Stoughton fell. But the allegation that Mr. Stoughton was struck with the handle of the dagger while lying on the ground, is much more incredible, according to the evidence. It is only stated by Weir, Haycock, and M'Gowan. Mr. Ball, though he speaks of blows with the cane, does not confirm them. He only says that the prisoner struck Mr. Stoughton *while falling*, two or three blows with the cane, but not after he fell. Mr. Clark saw no such blows—Mr. Phelps did not see them; Mr. M'Williams says the prisoner was striking, or going to strike the deceased with his fists, and that he had no cane in his hand; Mr. Baker denies that the prisoner had the cane in his hand; so do Mr. Wilder and Mr. Cambreleng.

Further, Mr. Wilder says his impression is, that he saw the dagger on the cartway, immediately after Mr. Stoughton was raised, and on the spot where they were, and that he did not see it in Mr. Goodwin's hand. Mr. Weed says he saw the two pieces of the cane on the cartway: he however adds, that this was while Mr. Stoughton was down. On this latter point I doubt his accuracy as to the exact time; as I am also compelled to think him mistaken about the number of blows which he says were struck before Mr. Stoughton fell. Indeed the whole affair took place so rapidly, that short spaces of time might easily be confounded, and the facts which are certain, show he must have erred in point of time. The dagger, to have been lying on the ground by the side of Mr. Stoughton while he was down, must have been drawn ten inches out of the wound and placed beside him. Mr. Stoughton's fall was on his back, and

rather on the left, which was the wounded side, and he lay in that position: Mr. Goodwin's hands are said to have been active from the moment of the fall about the face of the deceased. The wound I have already shown, and I think it is certain, could not have been given in the conflict before the fall, but must have been received during or by the fall. How then could the hand of Mr. Goodwin have drawn the dagger out from the back of a man lying on his back, and on the wounded part, for such a length as ten inches, and not be observed, and his hands stated to have been constantly active about his adversary's face? Is it not more likely that Mr. Weed is mistaken as to a few seconds than that impossibilities have happened? He certainly is mistaken as to the number of blows which passed before Mr. Stoughton's fall. Although looking on from the very first, he saw but one blow given by Mr. Stoughton, and one by Mr. Goodwin, which knocked the former down. Every other witness present at that part of the transaction, (for Mr. Clark was not) agree that there were several blows given by each of the parties before Mr. Stoughton fell. In this respect as well as about the dagger, if Mr. Weed had not been disturbed and agitated, he would not have been mistaken. But he could not have seen the dagger lying by Mr. Stoughton on the ground; for in another part of his testimony, he said that when Mr. Stoughton fell, owing to the crowd, he could not see him, and he did not go off his stoop to help him up; he therefore could not have seen the dagger at that time. No doubt he saw the dagger on the ground, but it was at the time that Mr. Stoughton fainted, and was again near falling; and now to his mind's eye it appears as if he saw it when the deceased had fallen. He is only wrong in the appropriation of a small portion of time in a very rapid transaction; and if so, he was right in all the rest.

It appears from the testimony of some witnesses, that the prisoner had the dagger in his hand after the affray; but none of them saw it there till after Mr. Stoughton fainted. Mr. Clark, who goes farther in this respect than any other, only said he saw it in Mr. Goodwin's hand while the deceased was fainting, and he yesterday said it was after Mr. Stoughton had fainted. As to a small portion of time or minute fact, his accuracy also may well be questioned, for he is doubtless inaccurate in his account of the scuffle, and of Mr. Stoughton's striking after he was raised up. Surely then, no witness who is incorrect in prominent transactions, can be implicitly relied on for small portions of time, of which he now speaks only from distant recollections. Neither Weir, Baker, Ball, nor M'Williams, saw the dagger in Mr. Goodwin's hands after the affray and before Mr. Stoughton had fainted. M'Williams was peculiarly well situated for seeing every thing, and is perhaps the most consistent and correct of all the witnesses in his whole story. M'Gowan cannot say whether the prisoner had the dagger in his hand when separated from Mr. Stoughton. Mr. Wilder denies it, and so does Mr. Cambreleng. The only explanation which can reconcile this testimony is, that the dagger was picked up and given to the prisoner; and Mr. Cambreleng says his impression is that such was the fact.

My client, a stranger, and knowing nobody who was there, either by name or person, except Mr. Cambreleng, and not having been himself observant of incidents, at the time apparently immaterial, cannot designate by whom this was done, nor produce him as a witness; but the probability of the fact, its tendency to reconcile apparently contradictory evidence, and the impression of Mr. Cambreleng, must be enough to induce a jury to believe that it took place.

I think the observations I have submitted to you, are sufficient to make you reject that statement, upon which there is so much contradictory testimony, that the prisoner had the dagger in his hand, and was using it about the head of the deceased while he was lying on the ground. If that be not the fact, and that my client had before that parted with the dagger, let us see whether an explanation of the fatal accident does not naturally present itself. The prisoner was himself in danger of falling, and if he had retained the dagger in the position in which he was holding it, he himself would have been the person to have fallen on it and to have received the wound. From a vague apprehension of this danger, or in the struggle to save himself from losing his balance, he parted with the weapon. While it was falling to the ground, the deceased was falling also: the point may have entangled in his outer coat, and the weight of the handle may have brought it to the position capable of giving to the wound the direction which has been sworn to, or Mr. Stoughton may have fallen on the dagger as the handle reached and rested on the ground, before it could acquire an horizontal position; and afterwards, when Mr. Stoughton was raised up, the action and motion in rising, or the weight and shifting of his clothing, or accidental rubbing against some of those that were in contact with him, may have contributed with the weight and bulk of the handle, and the slender and tapered form of the blade, to make it fall out, unobserved and unnoticed in the hurry of the transaction.

Our adversaries have no right to object against this explanation of the melancholy catastrophe, that it is unproved. The burthen of proof, as I have already stated, still rests on the prosecutors; and it is incumbent on them to show a state of facts, fixing with reasonable certainty the infliction of the wound, on a *voluntary* act of the prisoner, and irreconcilable with any supposition of misadventure. It may be said, that the casualties which I contend for are not likely to occur, and are in themselves extraordinary. To that I answer, that stronger objections lie against the supposition of a voluntary stabbing by the prisoner, for it is in itself nearly if not entirely *impossible*. The range of chances is almost incalculable and infinite, and every one the least conversant with the accidents of life, knows that most extraordinary results in appearance, frequently happen fortuitously. There is scarcely a man who has not often seen things happen by accident, which he could not accomplish by any effort of dexterity or skill. And I do not hesitate to say, that an impartial reflector on this subject, will be much more inclined to believe that unexplained and perhaps unnoticed casualties concurred to cause the infliction of the fatal wound, than that it was

the result of a voluntary act of the prisoner, which could not but have engaged the attention of all the spectators, and which was observed by none of them.

It is true, that from the contradiction of the witnesses, nothing except the wound itself, and its direction, can be said to be proved with certainty; and the unfortunate man who stands accused before you knows nothing of the fatal misfortune, nor could he without knowledge of what was to be proved, either instruct or guide us. I am therefore obliged to reason in the alternative, and to show, that from no statement of the facts can an impartial jury derive sufficient evidence of his guilt: and in making inferences for or against the prisoner, justice and mercy should go hand in hand.

The conduct of the prisoner after the fact, shows he was not conscious of the fatality, and that it was entirely a misfortune. The surprize he manifested when the unsheathed dagger was given to him: his deliberately remaining on the ground until Mr. Stoughton was carried into the neighbouring store, and his only then retiring by the advice of Mr. Cambreleng: the open manner in which he kept the dagger in his hand, without disguise, after it had been given to him: all these things show that he had not knowingly given a wound. Had he been conscious of killing the deceased with that same dagger, would he not have thrown or given it away? Would he not have disappeared among the crowd and flung it into some area as he passed. He did not believe that Stoughton was a dying man; but when he saw the situation in which Stoughton was carried into the store, and heard the expression of Mr. Phelps, it first occurred to his mind that some unfortunate accident had happened which he was unable to explain; and then for the first time he asks whether it would not be more prudent to pass over to Jersey for a time, than to remain exposed to the threatening hostility of the crowd.

He arrives safely in Jersey; would not conscious guilt, if he were guilty, (for conscience will make cowards of us all) have counselled flight? On the contrary, he walks with company to the tavern, where he remains two or three hours, at liberty to dispose of himself as he may think best. He seeks no opportunity to escape; and when the officers of justice at length come over and intimate to him their purpose, though he was apprised they had no legal authority to touch him, and full well knew the spirit and angry jealousy of that state, against what they consider as the usurpations and encroachments of New-York; though he had every reason to believe that an army would have turned out to oppose any persons who would dare to take a prisoner from among them, and convey him back to this city, in violation of their state authority; yet he at once expressed his determination and readiness to accompany them. And notwithstanding the courage and address of Col. Warner, if my client had raised that hue and cry, he would have excited a host that would have made a bloody catastrophe to the expedition of Col. Warner and his officers.

But no: he resisted the opinion intimated by a man of the first

legal information. He told Judge Butler, I know my rights, but I will make no resistance. I will not withdraw myself from the laws nor from the jurisdiction of New-York. In all this transaction do you not find a steady calmness, and an absence of all self-reproach, which must powerfully weigh on his side in the scales of justice?

Gentlemen of the jury, I am the last to address you on behalf of my client, and I must now commit his worldly prospects, his character, his happiness and fate on earth, to the adverse observations of most able counsel, and to the deliberations of your judgments. At the time of life to which most of you are arrived, I cannot hope successfully to call on you, as perhaps I might on younger men, and entreat you to commune with your own hearts, and to consider the failings and the frailties of youth. I scarcely dare say to you, that the indiscretions of a young man often result from the noblest elements of our nature; that God has given to him warm blood, a sanguine temperament and ardent spirit; that nature will occasionally have its course, and that the workings of nature must be indulgently and mercifully viewed by all who are made by Nature's God. I fear your opinions may be too severe for such an appeal, and that there is no point of contact between you and the unfortunate prisoner at the bar, by which I can hope to awaken your sympathies. But there surely is—some of you must be fathers. Has any one among you a son, noble, brave and generous, whom you love with all a father's fondness, who is the delight and pride of his mother's heart, and lovely in the eyes of his sisters? Think on *him*. He may be involved by the hasty error of a moment, or by the precipitancy of another, in one of those terrible conflicts which the noblest and the bravest cannot always avoid. If you have such a son, my eloquent adversaries, who are to speak when I must be silent, may perhaps place him before your eyes, and make a parallel between his fate and that of Stoughton. If so, I must submit to it. But let me conjure you, that even the tender feelings they may excite, may not estrange your hearts from mercy. Remember also, that if he should be engaged in such a deadly contest, he may not be so fortunate as to close his eyes, and escape from the sorrows, the calamities, the miseries, and the agonies of life. He may be the wretched survivor; though guiltless of any evil intent, he may be doomed to nourish in his bosom a never-ending pang; you may hear him exclaim to you in the depth of grief, as that young man has to myself, "Would to God I were in Stoughton's place!" He may stand accused in that very box, surrounded by the fears and anxious wishes, but I trust in God, protected by the prayers, of a doating and distracted mother, and of his agonized sisters. He may stand in that box, and you may occupy from day to day, that seat of torturing suspense which the gallant brother of my client has filled for now so many days. A jury may be called to pass upon his actions, and to devote to ignominy, one intended by nature to be an ornament to the community in which he lives, and whose heart is guiltless of any criminal design. By what rules would you wish that son to be judged? Would it be by those rules, if any such there be of human contrivance, which are reckless of the innocence of man's inten-

tion, which adjust offences by artificial reasonings, and constitute crimes from a guilt created by themselves; or by that rule which comes direct from God, and by which he administers justice in mercy to all his creatures? Would you not entreat that his fellow men might deal with him, as you trust the great Searcher of Hearts will deal with him on the final judgment of us all? So do you by my client. If his intentions were base and wicked, I do not seek to save him; but I entreat you, try him by his intentions, as that Judge will do who regards not technical distinctions, which are the offspring and the proof of human weakness; whose all-seeing eye looks into the heart of man, and if that heart is guilty will condemn; but if innocent, will acquit. I call upon you now, and I only ask you to act with the prisoner, as I hope the God of mercies will, when you and he shall stand before that awful presence; you to answer for your verdict, and he for his indiscretions. Let your judgments be tempered by a portion of the Almighty's loveliest and divinest attribute. The rule by which he will judge us sinners, sheds a light of justice for your guidance, compared with which, the learning of these books is darkness, and wherever they blindly depart from it, they are only filled with technical subtleties and metaphysical error. Like the God of wisdom and benevolence, attach crime to the intention, and to nothing else—absolve the innocent of heart; and when you return to the bar with your verdict, say to my client in the blessed words of the Redeeming Son of that God—"Go, and sin no more."

There was now a short recess—the jury were permitted to take some refreshment, and being again called over and answering, Mr. Griffin, on the part of the prosecution, then addressed the jury as follows:

Gentlemen of the Jury;

We have now reached the period of this interesting trial when it becomes my duty as one of the counsel to whom the cause of the people has been committed, to address you. The event which gave rise to this trial was one calculated to make a deep and lasting impression. The fatal 21st of December, 1819, is a day long to be remembered. On that day our city was alarmed, not with the cry of fire, to which our ears are accustomed, but with the cry of murder! Nor was it a causeless alarm. An interesting young man—one who had already become the idol of his relatives, and who promised to become an ornament to his profession, and a blessing to his country, lay in our most public street, writhing in the agonies of a violent death, his heart perforated with a dagger. The grand jury of our city have found that the prisoner at the bar was the author of this appalling scene; and that the homicide was committed under such circumstances as rendered it felonious. Upon this charge, the prisoner has been brought to his trial; and surely no accused person ever appeared before a more humane court, or a more patient and indulgent jury. If according to the most charitable construction of the law and of the evidence, the prisoner can be found innocent, then in the sincerity of my heart I say, "God

send him a good deliverance." And even the afflicted parents of the deceased, the sanctuary of whose broken hearts one of the counsel for the prisoner has so needlessly violated by most unjustly imputing to them efforts to poison the public mind and pollute the streams of justice—even these agonized and traduced parents, from the depth of their sorrow, will also say, if it be possible that the prisoner is innocent, "God send him a good deliverance." But if the prisoner is beyond peradventure guilty—if he has wantonly imbrued his hands in human blood, and dared to commit this outrage in the midst of a populous and peaceful city, and in the open face of day, then, gentlemen, not only the laws of earth and of heaven, but even the dictates of humanity, demand his condemnation. To turn him loose again upon an injured community, unpunished and unreproved, perhaps to march in triumph over the very spot where Stoughton fell, would be an event not only repulsive to justice, but an event at which mercy herself, angel-eyed and heaven-hearted as she is, would drop an indignant tear.

In trials for homicide, the first inquiry that presents itself is, whether a homicide has in fact been committed. In the present case, this point unfortunately admits of not a shade of doubt. It is but too true that the lamented Stoughton sleeps, never more in this world to wake. In the morning of life, with an horizon before him as broad and as brilliant as ever gladdened the eye of an American youth, he has been suddenly consigned, by a violent death, to the dark and silent tomb.

The next question in the order of inquiry is, whether the prisoner at the bar committed this homicide. The counsel for the prisoner have relied with great emphasis on the supposed confusion of the testimony. The occurrence to which the testimony refers, was calculated to produce confusion and dismay among those who beheld it; and it would be passing strange indeed, if in the history of such a scene all the witnesses should recollect alike. But it will be found that the great features of the testimony, in substance, harmonize. Nor is it surprising that there is no witness who saw the mortal wound inflicted. The confusion of the moment, and the dress of the deceased and the prisoner, both of whom had coats with large capes descending nearly to their elbows, afford a sufficient explanation. If the wound was given by an underhand blow, it was indeed scarcely possible that any of the spectators should have seen it. That no eye beheld the mortal stab, is not, therefore, a circumstance from whence any inference in favour of the prisoner can be correctly drawn. The law does not require that measure of evidence. Positive proof is never indispensably requisite. A radical error upon this subject sometimes obtrudes itself into the minds of jurymen, especially upon trials for homicide. Permit me to say, that it is a dangerous error; an error which, if indulged in, must always embarrass, and may often totally obstruct the administration of justice. Adopt the position that positive proof is a necessary prerequisite to conviction in cases of homicide, and you at once throw the mantle of impunity over that dark department of

crime where poison is the instrument of murder. Who that is bent on this foulest of offences, calls in a witness to see him administer the fatal drug? Adopt this position, and assassination may prowl in triumph through the land, and deal his deadly blows in safety, if he only deals them unseen. But this is not a position sanctioned by our law. Many a culprit has been consigned to the gallows and the gibbet, and that too through the instrumentality of the most intelligent and humane jurors and judges, upon the strength, the overwhelming strength of mere circumstantial evidence. Facts and circumstances are nature's testimony; and they ofttimes speak a more authoritative and convincing language than that of the most positive witness. Witnesses may be depraved, witnesses may deceive; but facts and circumstances are incapable of corruption; facts and circumstances never lie.

And do not the circumstances connected with this transaction force upon the most reluctant mind the melancholy conviction, that the prisoner at the bar is guilty of the homicide wherewith he is charged? In the front of these circumstances stands the prominent and conceded fact, that the death of the deceased was occasioned by the prisoner's dagger. Now, either the deceased fell upon that dagger when it was upon the ground, or else it was held in the prisoner's hand when it gave the mortal wound. If I am not mistaken, the evidence must convince you beyond the reach of doubt, that the first of these suppositions is utterly impossible. Look at the handle of that dagger. You perceive that its end is not square or flat, but oblique. Nothing but a miracle could make it stand on its end, unsupported as it must have been by any stone, ice, or other contiguous substance lying in the street; and the conjecture that the dagger might have been upheld and directed to the heart of the deceased by being entangled in his garments, is scarcely within the range of possibility. Again, the witnesses inform us that the deceased fell on his back. Then how could the dagger, thus standing on the ground, have entered his side, and perforated his heart? The dagger thus situated, even if you suppose that by some magic power it could have sustained itself on its end, must have entered the deceased through the back, and not through the side. Besides, it is at least difficult to suppose that the dagger would have extricated itself from the body of the deceased without extraneous aid, and without being seen. But why waste time in this process of reasoning, when the proof is positive and clear, that from the commencement of the affray, until death concluded it, the dagger never left the prisoner's hand? When death had closed the scene, and not till then, the prisoner threw the dagger away. As this appears to me to be a controlling point in the cause, I beg the favour of your patient attention while I proceed step by step in the examination of the evidence bearing upon it. That the dagger was in the prisoner's hand at the commencement of the affray, that he used it in the combat, and that it continued in his hand down to the time when Stoughton fell, appears from the testimony of Weed, Weir, Haycock, Ball, Phelps, M'Gowan, and Vanvalen. If the testimony of

these seven witnesses needed any confirmation, you have it from the lips of Mr. Cambreling. He has testified before you under no common circumstances. He was the companion, and is the friend of the prisoner; and yet we ventured to appeal to him on the part of the prosecution! We were not ignorant of the force of his friendship: even in the course of the present trial, we had seen it filling his sympathizing eye, sometimes with the tear of hope, and sometimes with that of concern. We knew which way his heart would lead him, but we also knew that his conscience would be stronger than his heart. Nor has he disappointed our confidence. Though he has clung close to his friend, he has adhered still closer to his own integrity. Even from him we have extorted decisive evidence of the important fact, that down to the time of Stoughton's fall, the prisoner still retained the dagger. And after such evidence, we need not wonder that one of the prisoner's own counsel found himself obliged in the course of his argument to concede the fact, that the dagger was thus retained by the prisoner.

But the evidence does not stop here: Weir, Haycock, M'Gowan, and Vanvalen, inform us that *while the deceased was down*, the distinctly saw the dagger in the prisoner's hand. Even if you disregard the testimony of Vanvalen on account of his misconception as to the manner in which the dagger was held, you have still the positive testimony of three witnesses as to the prisoner's possessing the dagger while the deceased was down. It is true that the other witnesses did not then see the dagger in the prisoner's hand. But is the negative circumstance that the last mentioned witnesses did not happen to see the dagger at that time, to controul and outweigh the positive oaths of the witnesses who testify that they then distinctly saw it? Does not the plainest understanding recognize and sanction the well known rule of our law, that the positive testimony of even a single witness counterbalances and overrules the testimony of many negative ones?

But we have reached another epoch in the history of this transaction. The deceased has risen on his feet. For a moment, he assumes the attitude of defence, but he assumes it for a moment only. The paleness of death is seated on his brow, and in an instant he falls into the arms of a bystander. *At this period the fatal dagger is still seen in the prisoner's right hand.* Mr. Benjamin Clark tells you, that he then saw it there. And you may readily conceive that the view of it, under those circumstances, was well calculated to make a deep and permanent impression on his memory; an impression which, perhaps, no change of place or lapse of time will ever obliterate or impair. M'Williams, who received the deceased in his arms, and M'Gowan, who had witnessed the transaction from an early period, confirm in substance the testimony of Mr. Clark; and if further confirmation is wanted, you have it from Mr. Leonard Baker, who testifies that after the final fall of Stoughton, he saw the prisoner throw away the dagger.

From this review of the testimony, it clearly appears that the prisoner held and used the dagger until Stoughton fell; that while

Stoughton was down, the prisoner retained it still; and that after the deceased had risen, and finally relapsed into the arms of death, then, even then, the prisoner continued to wield in his right hand the fatal weapon! And are we now to be told that the dagger was on the ground, and that unfortunately the deceased fell upon it there? How came the dagger on the ground, and in the very track in which Stoughton was retreating, and how came it back again into the prisoner's hand? If it was thrown or fell from him before the fatal deed was done, why did no person, not even Mr. Cambreleng, see or hear it fall? And who restored it to the prisoner? Not even Mr. Cambreleng has ventured to swear that any person restored it. And had such a person existed, would he not have announced himself as a witness, or at least have been discovered by the industry of the prisoner's friends? The visionary theory then, that by peradventure the dagger was on the ground, and the deceased fell on it there, is dissolved by the stubborn fact, that until after the work of death was accomplished, the dagger never went out of the prisoner's hand. Nor has the prosecution any difficulty to encounter from the alleged want of power in the human arm to inflict such a wound, in the then situation of the parties. The situation of the parties was constantly varying, and therefore forms a ground for no definite theory. Sometimes the deceased presented his front, and in his retreat, he no doubt sometimes presented his side to the assailant. The supposed lack of power in the human arm to inflict such a wound, rests on no other basis than the solitary unsupported opinion of Dr. Mott. Opposed to his, stand arrayed the opinions of four surgeons as respectable as himself. That the arm of an athletic man, invigorated with rage, is unable with such a weapon to inflict such a wound! To refute this supposition, we need not travel back to the times of Sampson or Achilles, nor need we have resorted to the learned gentlemen of the faculty. Contemplate for yourselves, the prowess of a vengeful right arm at the present day; mark its operations during a single campaign, or even a single battle; see it severing limbs from their trunks, and cleaving heads asunder! And then judge for yourselves, in what estimation you are to hold the hypothesis of the learned Doctor Mott. Nor was the arm of the prisoner an inexperienced one. To show this, a witness was asked whether the prisoner had not been a military man. The object of the question was not, as the adverse counsel have most unjustly insinuated, to cast indirect reproach upon the military and naval heroes of our country. Its object was simply to show, that from his pursuits in life, the prisoner must have been expert in the use of arms.

The supposition of the dagger's being on the ground, and that the deceased fell or was thrown upon it, being thus excluded by the evidence, it will be useless for me to follow the learned counsel for the prisoner, in the ingenious inferences which they have attempted to deduce from that supposition, or to inquire whether or not death thus occasioned would be manslaughter, and manslaughter triable under the present form of indictment. Willing as I

should be, to assume the affirmative of each of these questions, I am relieved from that duty by a mass of evidence, clearly showing that the dagger was grasped in the prisoner's hand when it penetrated the heart of the deceased. If this is indeed the necessary inference from the testimony, it follows, of course, that the important point has been established, even according to the very letter of the indictment, that the prisoner committed the homicide. And the establishment of this point, places the case within the range of the principle of criminal law, which I submitted to you in an early stage of the trial: *That in every charge of homicide, the fact of killing being first made out, all the circumstances of excuse or justification are to be satisfactorily proved by the prisoner.** Has the prisoner, in the case before you, satisfactorily proved any circumstances of justification or excuse? The justification of self-defence is scarcely pretended. The excuse of *accident* is relied on. One pretence of accident has already been exploded. Other modes of accident are suggested; but has any of them been satisfactorily proved? It is not for us to disprove these suggestions, but for the prisoner clearly to establish them. Without, however, further pressing the principle which devolves upon the prisoner the burden of the proof, we will proceed to show that the excuse of accident, even if it existed in point of fact, could not, under the circumstances of the present case, afford the prisoner any legal defence. And here I must invite your attention to another principle of law, which I presented to your consideration at an early stage of this cause. The principle here alluded to is this: *That wherever the defence of accident is relied on, in a case of homicide, it must appear that the person committing the homicide was not engaged in a violation of the law.*† If the shedder of human blood expects to escape with impunity, he must show that though his hands are stained, his heart was pure, and that his feet were not treading in forbidden paths. The cases which have been read to you from the books, (here the counsel went at large into the cases which he had before cited) show the antiquity, the universality, and the sacredness of this great principle of the common law. The counsel for the prisoner, aware of the tremendous bearing of this principle upon their client's case, have intimated to you, in a way not to be misunderstood, their wish that you should expunge from the common law this ancient and vital principle, or that you should at least modify, impair, and cramp its operation. In reply to this intimation, I might remind you of your oath. But cancel that oath, and I trust that your decision would be the same. It must be the same, if you have duly considered the utility and majesty of that venerable system of jurisprudence, known by the name of the *common law;* a system which our forefathers brought with them to this country, and which they hugged to their bosoms with almost as much ardour as they did their religion. It was at the altar of this very common law, that the spark of 1776

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* See page 105. † See pages 105, 106.

was kindled. And if our revolution differed from all other revolutions that preceded, or have followed it—if it differed from that which is now working its convulsive course in the southern part of this hemisphere—if our infant independence was not baptized in civil blood, it was because the common law "rode on the whirlwind and directed the storm." This common law has been our country's earliest, best, and may it remain its latest friend. Venerate, and teach your posterity to venerate its transcendent virtues; respect even its foibles; and let no rude hand pluck a hair from its hoary head.

Nor is this principle of the common law harsh or unreasonable. If a man will engage in an unlawful enterprize, or pursue any enterprise whatsoever by unlawful means, or with unlawful weapons, he must be contented to do it at his peril; and if a homicide occurs, he ought not to expect that the law will hold him guiltless. Let us apply this principle to the case under consideration. On the 21st of December, at the hour of three o'clock, the deceased was going up Broadway, probably with an intention of proceeding to his father's house. The prisoner at the bar, in company with Mr. Cambreleng, met him. The deceased was unarmed; the prisoner was armed with a swordcane. As he approached the deceased, the prisoner pointed at him with his cane. Perhaps this pointing of the cane was of itself a consummated offence.

(The Mayor here observed, that he did not consider the pointing of the cane, under the circumstances, as coming within the legal notion of an assault.)

Mr. Griffin proceeded.—The pointing of the cane was the lightest circumstance of the aggression. It was the outrage of the tongue that gave to the transaction its character. The words, "there goes a scoundrel and coward," accompanied the pointing of the cane, and the words were reiterated by the prisoner as he passed the deceased. The pointing of the cane was seen, and the insulting appellations were heard by the person for whom they were intended. The deceased instinctively paused. But he remembered what was due to the laws of his country: he communed with his indignant spirit, and for a moment impressed upon it the mighty resolution of rising above the insult. He proceeded towards home, but the load was heavier than he could bear; reflection goaded him to frenzy. He had been pointed at in our most public street, and, in the presence of a witness, branded with the appellations of scoundrel and coward. He felt himself to be an outlaw in the universe. Hapless youth! Whither could he go? Could he enter the presence of his venerable and revered mother, branded with the appellations of scoundrel and coward? Could he proceed to the house of a father of Castilian honour, branded with the appellations of scoundrel and coward? Where, oh where could he spend his hours of conviviality, branded with the appellations of scoundrel and coward? The deceased returned; he gave a blow. Had he done otherwise, he must have been something more or less than human. He must have had much of the brute, or something of the divinity

about him. He must have been sunk below the level of the Hottentot, or else he must have taken deep lessons in the school of him, who spoke as man never spoke, and whose kingdom is not of this world. But the deceased did not begin the affray. It is a mockery on his memory to say that he began the affray. The first blow was the blow of the tongue; a blow more piercing than that which the dagger gave.

But the second act of the tragedy is at hand. Upon receiving a slight blow, which he himself had provoked, and indeed, calculating upon the common principles of our nature, rendered inevitable, the prisoner strikes the deceased with his swordcane. The dagger immediately becomes separated from the sheath, and is retained by the prisoner. At the sight of the deadly weapon, the deceased begins to retire. With this deadly weapon in his right hand, the prisoner pursues his unarmed and retreating victim, striking him with the dagger until he fell, and, as many of the witnesses testify, after he had fallen. Was the use of such a weapon, under such circumstances, lawful? If its use was unlawful, then the prisoner, according to the principle heretofore stated, and the cases read to you as elucidating that principle, used it at his peril, and must be responsible for the consequences.* In what code of laws is the justification of such an use of such a weapon to be found? Is it contained in the law of self-defence? It is a kind of impiety to attempt to apply that great and hallowed principle of nature's jurisprudence to such a case. Is it to be found in the laws of chivalry? Do the rules of the school of honour indeed sanction the position that a soldier prepared with a swordcane, may by gestures and words insulting beyond forbearance, tempt an unarmed citizen to strike him, and that he may then pursue the unequal combat with the drawn dagger? Is the justification to be found in the law of the land? To you, gentlemen, as the sworn administrators of that law, the question is solemnly propounded; and your answer, your momentous answer, is presently to be registered on the records of this court. Say that the conduct of the prisoner was lawful, pronounce that the venerable law of the land will henceforth sanction such transactions, and your verdict will form an era in the moral history of this community, of portentous and awful bearing. Yes, gentlemen, the prisoner's acquittal might accomplish more mischief than his dagger wrought; it would be planting a dagger in the heart of our criminal jurisprudence. Will you plant that dagger there? No, gentlemen, I am persuaded, that arduous and heart-trying as are your obligations, you will perform them faithfully. And, to pursue the case so pathetically supposed by the counsel who last addressed you, I trust, that even were the prisoner at the bar your own son, you would triumphantly rise above the yearnings of nature, and that, like a jury of Roman fathers, you would do your duty.

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* See pages 106, 107.

But upon what basis rests the supposition that the wound was inflicted by accident? How accidental? He upon whom the duty of explaining devolves, has given us no satisfactory explanation. The mysterious exchange of canes the very evening before the fatal rencounter; the prisoner's ramble in Broadway, armed with a deadly weapon, at the hour when the deceased was known to be in the habit of proceeding through that street from his office to his father's house; the unprovoked outrage of the tongue, succeeded by the use of the swordcane, are circumstances fraught with awful indications of design. And when the swordcane becomes separated, why is the sheath thrown away, and the dagger deliberately retained? The sheath, by itself, is a formidable cane, better calculated than the dagger for striking or any other ordinary purposes of combat. But the dagger is best fitted for a deadly thrust! It is retained; it is used; and the deceased falls. The fall was a peculiar one, and filled the spectators with surprise. They saw no blow given adequate to produce such a fall. The dagger, could it speak, would solve the mystery. But the prisoner was cool and calm over the scene of death; and therefore, say his counsel, he must be innocent. A bystander pronounced his victim "a dead man." These words were heard by the prisoner, and made such an impression on his mind, that he afterwards repeated them to his companion, Mr. Cambreleng, as an excuse for his flight. He well knew the truth of the words. He knew the energies of his own right hand; and the paleness of death which had seated itself upon the face of his victim, assured him that the dagger had not missed its aim. But amidst the general perturbation he was cool and calm! No tear of sympathy softened his eye; no pang of regret moved his heart. Innocency, gentlemen, never, in any age or clime, stood thus composed and indifferent over a dying man, whom it had by misadventure slain. The coolness and calmness of the prisoner, were the coolness and calmness of stern, and ruthless, and inflexible vengeance. He was unmoved, because no event had happened but that which he desired and purposed; he pressed the call of no medical aid, for he well knew that there was only one Physician who could cure, and not even He without the performance of a miracle. But the prisoner returned from New-Jersey without resisting the police officers who had been sent after him! And is this evidence of innocency? What benefit would have resulted from his resistance? It might have gathered around him an assemblage of people; but let me assure the learned counsel, that the good people of New-Jersey would have assembled, not to aid the escape, but to secure in safe custody, the shedder of human blood fleeing from justice.

Had the prisoner been indicted for murder, his trial might have been more perilous to him than "the imminent deadly breach." But the grand jury have kindly mitigated the offence to the grade of manslaughter; and you, gentlemen, are urged with all the power and pathos of impassioned eloquence to whiten it into innocency. To make a lodgment in your hearts, the gallant brother, and the youthful and lovely sister, and the venerable mother of the prisoner,

have been arrayed before you. The syren voice of pity has been sounded in your ears in behalf of the prisoner's youth. And you have been invoked as you value your own salvation, to temper justice with mercy. Mercy is indeed an heavenly attribute—it is the very attribute of the Godhead, to which we erring mortals will most ardently cling in that day of retribution, when we must all appear before the judgment seat, not as judges, or jurors, or counsel, but as prisoners at the bar. Nor is this favourite of the skies a stranger to our system of jurisprudence. Our constitution has provided a place for it to dwell in, even the mercy-seat of the executive. But jurors may not, must not tamper with it; an oath enjoins them to forbear. It is chiefly because the law knows jurors to have compassionate and erring hearts, that it fortifies them by an oath; compelling them to lay their hands upon the word of life, and to call upon God to help them, or not to help them, as they decide according to the law and the evidence. Awful alternative, cleaving unto, or renouncing the *help of God!* And yet, gentlemen, this oath, with all its sanctions, rests upon your souls. Keep your eye stedfastly fixed upon it, as the polar star to direct you in all your deliberations. That solemn oath requires you to do your duty. The blood of Stoughton, from his new-made grave, demands you to do your duty. And as one of the ministers of the law, I call upon you, in the name of the ever-living God, to do your duty.

Emmet. Before Mr. Wells goes on, I beg leave to refer to the testimony of Mr. Cambreleng, that the facts may not be left in doubt. He says, that in striking the blow, the dagger flew out of the sheath, and was partly exposed to view.

The Mayor. Mr. Emmet, do you not omit a part of that evidence, that it came out about four or five inches; and that he changed his hold, and took the dagger part in his right hand by the blade?

Emmet read a passage from his own notes, not materially varying, but that he should ask when it came to his turn, upon what ground it could be expected of the prisoner to abandon the pointed weapon to his assailant, keeping only the sheath in his own hands.

Mr. Wells then summed up on behalf of the Prosecution.

Gentlemen of the Jury:

In discharging the duty which it remains for me to perform; which I owe to public justice—to the memory of a man who was my friend—whom I knew and esteemed—whom I loved in life, and lamented in death; I shall have much more need to struggle with my own feelings, than to endeavour at exciting yours.

I do not seek to gratify vindictive passions. I will not appeal to your passions, nor to your prejudices if any you can have: I disclaim every attempt of that kind, nor would I triumph over guilt itself, by any other ways than those of truth and justice.

The counsel for the prisoner have treated with some respect the memory of the deceased. Why did they not also respect the parents who have lost for ever their beloved son? Why drag them into

notice? Why charge them with attempts to irritate the public feeling, and prepossess the judgment of a jury? What has transpired to warrant such insinuations, as cruel as unfounded? Why not rather "leave the stricken deer to weep?" Why rudely profane the sanctuary of a father's and a mother's sorrow? Why not permit them in secret to bewail their loss, to mourn for their child, to commune with their God, who alone can solace their affliction?

It will not be expected of me at this late hour, fatigued as we all are, and I particularly so, to enter into the long details of all the testimony. This is less necessary, since it has been put before you better than I am capable of putting it. I shall retrace the bold outlines of the case, and nothing more. I shall present the facts in such connection as in my judgment will lead you to the necessity of pronouncing a verdict of *guilty*, if your verdict is to be "according to the evidence." And I beseech you, gentlemen, let no considerations influence your minds, but those derived from truth and justice, and from the evidence on which you have sworn with such solemnity to find your verdict. I ask for that much at your hands, I ask for nothing more.

Look at the circumstances which led to this unhappy tragedy. See with what characters they are marked throughout—whether they do not clearly evince a settled and deliberate purpose of the mind. Walking in Broadway from the City-Hotel to the Park and back again, at an hour when it was almost impossible but the deceased should pass, since at that hour he daily passed that way—do you believe that this was purely accidental? If it were so, how different would have been the prisoner's conduct. Mr. Stoughton was seen at the distance of forty or fifty paces. Mr. Cambreleng names him, saying, there is your man, or, there is your friend Stoughton. What does he then? If his intent had been merely to convey to his friend the opinions he had formed of the deceased, why not then reply? Instead of that, his lips are closed. No word escapes till it can reach the ear of Mr. Stoughton—calmly and deliberately making up his mind, during an approach of thirty or forty paces, for that insult which he proclaims as soon as he comes within hearing distance. Then he raises his cane, and in words loud enough to be heard by the deceased, he says, "there goes a coward and a scoundrel." And lest this should not be enough, the words are again repeated as he passes by his elbow. And why point at him with his cane, why put it in his face, if his design was merely to indicate the person to his friend, whom that friend had the moment before mentioned to him by name? No, gentlemen, there could be no other motive than to provoke a quarrel. There is no other design imputable to words and gestures of this kind! He must have known that Stoughton, bold, manly, and high-spirited as he was, could not but resent an insult so gross, proclaimed in open day, and in the public streets. But if his opinion was such, if he did think so vilely of him as that he would submit, then there might have been indeed another motive, but one so mean and dastardly, as I would

not impute to the prisoner: because of all species of cowardice, it would be the most odious and contemptible.

This language, this pointing then, was clearly with the view of provoking his resentment and bringing on the affray. And though at that moment he might have no definite intention of taking Mr. Stoughton's life, yet when such provocation was given, it was to be followed by its natural and necessary consequences—the quarrel that was looked for. I speak from my own knowledge, what all who knew Mr. Stoughton must have known, that he would rather have stepped into his grave than not resent an insult which the tamest and the meanest of mankind could not endure. And yet because he did not submit to this treatment, he is called the aggressor and provoker of that quarrel in which his life was taken so unworthily, which ended in a tragedy that has caused tears that will flow while life shall last.

Yes! he provoked an unarmed man, holding in his own hand a stick, but what is worse, a stick in which a dagger was concealed; a stick which but the night before he had been told it was unsafe to use even to walk with. You all remember, gentlemen, that Major Smith, when pressed to the exchange, cautioned him that the dagger was loose and apt to slip, and that the string that fastened it was old and short, and to be careful in the use of it. That witness told you that when he had his foot upon a chair, tapping with this cane upon his boot, the blade exhibited itself to view. He must have known that when he attacked his adversary with it the sheath would fly, and the first blow showed that Major Smith had not cautioned him without good reason.

There, was a moment that might have appealed to his manhood—to his honour—that might have warned his conscience, and admonished him anew that he held that instrument which it was ungenerous and inhuman to make use of, and which he should have instantly cast from him. Not so! he seizes the blade, and the only notice he takes of it, the only idea it conveys to him, is, that it is better for his purpose than the cane, which he might have retained with equal ease, had his intentions been less merciless. And the moment after the catastrophe in which this combat ended, which lasted but some moments, he stands with this dagger in his hand, and at that same instant we find his adversary closing his eyes in everlasting darkness. Is not the conclusion irresistible, that Mr. Stoughton came to his death by this weapon, thus in the prisoner's hand, and used by him?

Here the prosecution might have rested. Here was a case of unequivocal homicide made out. And it would then have been for the prisoner to have shown his excuse, and explained the part he took or did not take in this affray. It was for him to show that the deceased was slain from some excusable or justifiable cause. Justifiable they do not pretend it was: the boldness, the ingenuity of his counsel has not ventured to assume that ground: but they have said it was excusable by misadventure. Why was not that

accident or misadventure shown? Who was to account to the jury and to the law for the stab and for the death? Can you believe the law so inefficient? True, it excuses accident, for it is merciful, and punishes no guilt but of intention. But can it so far ally itself with licentiousness, so far encourage audacity and embolden crime, as that a man may sally forth in open day, a deadly instrument about his person, vengeance in his heart, and insult on his tongue, seeking a conflict, ending it in death, and then satisfy an injured community and violated law by saying, I did not intend what I did, I did not know what I was doing, I am innocent, I am persecuted, I cannot say how this thing happened, I only know it was by accident; and since it is doubtful how it happened, a jury must acquit me?

Why carry, why use this deadly weapon? Why was the deceased waylaid on his accustomed path, provoked with the tongue, and stabbed to the heart with that very weapon which the prisoner used, and which we here produce? Was all this misadventure? Why not rather throw it away, since he stood not in any need of it for his defence? for no one will pretend that in strength, still less in skill in fighting, the deceased was his superior. Why not, if he was so high spirited, throw away his dagger and attack without arms a man that was unarmed?

Let me, gentlemen, propose a parallel case by way of illustration. Suppose a man to walk the streets carrying a loaded gun, and to provoke a quarrel; the gun is discharged, the adversary falls; all this is proved by many witnesses, he stands by the party slain, the gun still in his hand, but nobody has seen him pull the trigger—shall such a one say in a court of justice to a jury, the law is with me; I ask no mercy of you, I call for justice: if no man proves he saw me pull the trigger of that gun, the case is not made out: unless you prove that I held the gun, presented the muzzle to the head of my antagonist, and some one saw my finger act upon the trigger, I claim my right to go acquitted of the charge, and to go forth again to-morrow, armed for destruction, to deal death at my pleasure; and I defy the vain efforts of man to bring me to atonement?

Gentlemen, this is not the misadventure that the law contemplates. That must be an accident in the pure and ordinary acceptation of the word, growing out of a lawful act or lawful pursuit, uncoupled with any intent of mischief, and where all necessary caution has been used. Was it then a lawful act to provoke an affray, commence it, continue it, and end it with a deadly weapon; and when you find the deceased slain with this weapon in this affray, are you to be told it was a lawful act, without intent of bodily harm? For what other purpose can you suppose than to do bodily harm of some kind to his adversary? Where was the due caution that the law requires? The first and best precaution would have been, to have left his dagger at home: and the next, when he saw it unsheathed, was to throw it from him, and not continue to use it through the whole of the conflict, as it is proved he did.

And what is the amount of this pretended accident? That the prisoner held this dagger and the deceased rushed on it; that he made no use of it but for self-defence! Where is the particle of evidence that he only maintained his ground and stood on self-defence? Not only is there none, but it is clearly proved that Mr. Stoughton was the retreating, the prisoner the pursuing party; that the deceased gave way, the prisoner pressing upon him. And if in thus pressing him, the dagger ran into his body, I ask you in the name of common sense, was that an accident?

But it is said he fell upon this dagger, or peradventure he fell upon this dagger. And you are to screen him from the just punishment due to his offence, because peradventure it fell from his hand, and peradventure the deceased fell upon its point? I think this was matter for the prisoner to show, and where is the witness who pretends to have seen this dagger on the ground when Mr. Stoughton fell, or at any other time in such a way as that it could penetrate his body? The intrinsic evidence shows it neither did nor could occur that way.

I ask you, gentlemen, if you have doubts upon that subject, to take this instrument: take it in your hands, and try whether you can put it in any situation where it could pierce the body of a man falling directly backwards. There is not only no evidence to support a presumption so extravagant, but controlling evidence of the contrary: evidence so strong and cogent, that argument and disputation could but weaken it: and which cannot be resisted unless you are pleased to let your feelings of *mercy* overshadow and obscure your judgments, and break down every principle of law, which, as wise men and good citizens, you should ever venerate and uphold. If, unfortunately, jurors should be so far led astray as to turn aside from the evidence and from the obligation of their oaths, to make a false display of mercy, I can only say, that what was Stoughton's fate, may soon be yours or mine.

The only evidence to give any colour of support to this strange supposition was, that unaccountable opinion drawn from Doctor Mott. You must have seen the glow of exultation which spread itself over the prisoner's countenance, when that witness said that no man of modern days could have power to inflict that wound; an opinion put down by the experience of every man who has but common sense, and knowledge of the use of this or any other instrument, or even of his own limbs. And all the other physicians, of the most respectable in our city, unite in saying that the arm of an ordinary man, especially when impelled with rage, would with that instrument penetrate the boldest heart that ever was enclosed in human bosom.

The evidence, gentlemen, has been spread out before you in such detail, and commented upon so much at large, that you cannot fail at least to have a good general recollection of it. I shall finish with a more condensed review of it: which will be, I think, enough to show, that if any proposition was ever maintained in a court of justice by human testimony, so is this: that that wound could not

be inflicted upon the body of Mr. Stoughton by means of any accident whatever.

It is proved that the prisoner commenced this affray with a deadly weapon in his hand; and had no other witnesses been called than his friend Mr. Cambreleng, to whose regard for truth it is my duty to pay just tribute, his testimony would have been conclusive. He shows that this dagger was used by him—that after the affray began, there was some struggle to get possession of it—that he let go the sheath and changed his hold, and took the steel into his right hand—that till that moment Mr. Stoughton had the best of the affair. Now mark the fatal moment that changed the fortune of the combat. No sooner was the dagger fairly in the prisoner's right hand, than it finds its way into the heart of the deceased. A blow or two more and he is levelled to the earth to rise but for a moment, and sink again to everlasting rest.

Mr. Cambreleng saw his right arm, but he does not tell you that he saw his right hand. Where then was the difficulty, covered as he was with capes down to his elbows, to use the dagger and Mr. Cambreleng not see it? Mr. Cambreleng has distinctly informed you, that when standing on the curbstone, he could see the right arm of the prisoner, but that it would be too much to say he saw his hand. Nor does he pretend that his eye pursued him through every varying movement and alteration of position, that must have taken place throughout the struggle. That, then, was the moment of Mr. Stoughton's fate, when Goodwin seized the dagger in his hand; then it was he received his death wound! The blows that followed were but auxiliary to the blow that reached his heart: for it is well proved that they were not of themselves sufficient to bring him to the earth so suddenly.

(*Emmet* begged leave to interrupt the counsel a moment, conceiving that Mr. Cambreleng's testimony did not altogether warrant this statement or these comments, and read from his notes and appealed to the court; but the mayor observed that he had carefully read over Mr. Cambreleng's testimony as he had minuted it down, and he had agreed to its correctness, and it did not vary from Mr. Wells's statement. Mr. Emmet referred, he said, to what Mr. Cambreleng had afterwards spontaneously said, which was not perhaps noted.) Mr. Wells proceeded.

I appeal, gentlemen of the jury, to your own recollection. I well recollect, and I doubt not it made the same impression upon you, the candour of that witness. His desire to serve his friend was strong, but it was not strong enough to conquer his integrity; and the answers to the questions asked him, were not what were hoped for by the gentlemen who interrogated him. But had it been otherwise, supposing he could all the time have seen the prisoner's right hand, if, as they say, the prisoner threw away the dagger, where were his eyes and ears that neither saw nor heard it?

Nor does Mr. Cambreleng stand alone in this. He is confirmed by four or five others, all speaking to the same effect, that he held the dagger and continued the conflict with it until Mr. Stoughton

fell. Then you must, before you can acquit the prisoner, be willing to believe that just as the deceased was falling the dagger slipped out of the prisoner's hand in such a manner as to combine miraculously with the fall, and cause the death. But if you are observant of your duty and attentive to the evidence, as I know you are, you will find that from indulging in such conjecture you are absolutely and utterly precluded.

Witnesses, whom you cannot disbelieve, have sworn to you that when the deceased lay on the ground, this dagger remained still in the prisoner's hand: that even when the most angry passion might have been appeased; the most malignant vengeance glutted; a few moments of life remaining; a few short moments yet to pass and he to be no more, you find that prisoner using it inhumanly upon the head and face of his prostrate adversary! And now they are driven to their last entrenchment. They say if he did not let it go, but still held it fast, Mr. Stoughton must have fallen upon it when it was in his hand. This is what you must believe before you can acquit. You are brought to this, and it is the only ground on which it is now possible for you to rest a verdict of acquittal; for since he held the dagger at the moment of the prisoner's fall and at the moment he rose, it is trifling too far with justice to say it ever was out of his grasp. And I refer you confidently to the witnesses who have sworn that he not only held it at that moment when he fell, but that he had it and used it too when he was down, and had it also at the moment when, with the aid of some kind stranger, he rose again, and finally when he swooned away never to look on his destroyer more, when that tongue that could have silenced all conjectures was silenced, and forever.

And will you push this supposition so far, as that he held this weapon whilst it killed a man, and was unconscious of what he was doing with it? for if that be not what the counsel mean, it is something bordering upon it, though the ground was rather too bold to be openly maintained. In a word, gentlemen of the jury, can you doubt that the deceased came to his death by that dagger, wielded by the hand and arm of the prisoner at the bar? That his fixed determination from the first was to kill, I will not take upon me to pronounce; but that he did provoke the conflict, and use the deadly weapon, and that by means of it Mr. Stoughton came by his death, are facts about which there is nor can be no dispute. But if you give ear to the strains of fervent and impassioned eloquence in which the prisoner's counsel have declaimed, you may as well believe there was no dagger, that it is but delusion, prejudice, and calumny; that Stoughton never was stabbed, but is still living. I say it as the true conviction of my own senses, that it would be no less violent to say there was no dagger used at all, than to say it was not in Mr. Goodwin's hands when it caused the death of the deceased. Three witnesses at the least have sworn that they saw it: and in the face of all this testimony, with every circumstance to give it confirmation, you are asked to substitute for truth so palpable, conjectures incredible, if not impossible.

If he had fallen upon it and been transfixed by it, it would have remained in his body at least as long as he lay upon his back; it could not have fallen out until he was raised from the ground; where was it then? How did it come back into the prisoner's hands if ever it was out of them?

Mr. Weed alone, and he is the least distinct of all the witnesses, says he saw the dagger on the ground at some little distance from the deceased, when he was down. If this were so, it is equally fatal to the hypothesis that the deceased fell on it, since the dullest apprehension will perceive that it must have continued in his body at least till he rose up.

But no witness, you are told, has given evidence of the blow that killed the deceased: and you must acquit the prisoner, for he is charged with *killing by a blow*, and you have not proved that *blow*. Are we to bind fact to fact by links of steel? Will nothing serve but adamantine chains? Are you to make that ungrateful return for that precious gift of reason which your God has given you, that you will not use that reason, that you will not compare, that you will not combine, that you will adopt conjectures, however extravagant, rather than draw conclusions the most obvious and inevitable? If, gentlemen, you sanction this doctrine, that nothing shall be proof of manslaughter but direct evidence of the immediate blow, you blot a great part of your criminal jurisprudence out of your code.

And for what are you thus called upon so earnestly to surrender your reason and your judgment, and to tamper with your conscience and your oaths? Because, forsooth, the punishment of killing a fellow-creature, and a fellow-citizen, is too great for the offence—that it is disproportioned, because it is humiliating and degrading: and therefore a jury is to dispense with the law and follow a new one of their own making. It is then in vain that we have laws; in vain that we have juries and judges sworn to administer the law, if the mere caprice of a jury is to countervail the solemnity of the law, leave guilt to triumph with impunity in a commonwealth emphatically called the country—the government of law—whose peculiar boast and happiest privilege is the universal security and protection of the law. The law is that which guards your lives, and watches over your liberty, your fortune, and your honour. And if you have any interest more precious than another, the law assures you the free enjoyment of it. And will you trample on it, or will you reverence and maintain it? If the punishment of this offence be too severe, the legislature of the state must alter that. If there be hardship in the particular case, the governor may mitigate the punishment, or pardon altogether. But every rational motive, every moral tie, and every binding sanction of religion, imposes on you the duty to carry the law into its full and due effect.

I shall now, gentlemen, conclude. I proposed to myself no more than to present to you a brief and simple view of the true merits of this cause—which I think is enough to ensure the conviction of the prisoner beyond the possibility of escape. And I

sincerely hope I have brought you with me to the same conclusion. It is not from any vindictive feeling towards that man that I say this. I can conceive his situation, I can imagine the sorrow and contrition of his heart, if he has a heart capable of any feelings of contrition. He has entered deeply into the happiness of those who, but for his intemperate conduct, to call it by no harsher name, had still been happy; but whose affliction is now beyond all earthly cure. You owe it to your country to punish the offender, if he be guilty. You owe it to the peace and honour of your city, if he has been a violator of your law and a disturber of your peace. You owe it to your families, to your friends, and to yourselves. The midnight assassin may be avoided by the precaution of staying within doors, but nothing but the certainty of punishment and the efficacy of the law can protect you from the stiletto brandished in open day. And distressing as the case may be to the guilty individual, or to those connected with him, it would be more distressing to the community and to the peaceful citizens, that an offence so enormous should go utterly unpunished. Still, gentlemen, if you can find any ground of reason, which I cannot, to doubt of the guilt of the prisoner at your bar, why then acquit him. But let it not be, I beseech you, from a false sentiment of mercy ill applied; nor from a rash encroachment on the office of other constituted authorities, equally acknowledged by our law and constitution; nor from an unbecoming disposition to make the law rather than to follow and observe it. If, I repeat it, gentlemen of the jury, you find in the evidence enough to satisfy your reason and convince your judgment that the prisoner is guilty, I do entreat you by all the hallowed ties that I have mentioned, let no consideration but that of duty sway you; let nothing induce you to defeat the ends of justice, or prevent the uplifted arm of the law from falling on the guilty head.

(At the close of Mr. Wells's speech there was some movement of applause and clapping of hands, as there had been before at the conclusion of Mr. Emmet's, but it was instantly repressed by the authority of the court. Before the mayor proceeded to deliver his charge, Mr. James Glass stated that there was some difference amongst the jury as to Mr. Clark's testimony, whether it was, that the prisoner had knocked the deceased down with his hand merely, or whether he had any thing then in his hand. The mayor read that part of the testimony over, and then proceeded to charge the jury to the following effect:)

CHARGE OF HIS HONOUR THE MAYOR.

The Mayor said that he should at all times rise to charge a jury in a cause of this nature with the greatest concern. But in this case, after a trial which had lasted five days, and after having now been on the bench nearly fifteen hours, he could not but feel great apprehensions as to his powers to discharge the arduous task that

remained to him. That a consideration of the fatigues of the jury, as well as his own, would induce him to observe all the brevity consistent with his duty. He would not trust himself for a moment to advert to the particular circumstances on the one side or the other, which had rendered this case so interesting to the jury, the court, and to the multitude, which had day and night crowded the hall.

The prisoner at the bar was indicted for manslaughter. The definition of this crime was unlawfully killing a human being without malice either expressed or implied.

It must be observed, that this definition excludes the necessity of the killing being wilful. Nor does the word wilful appear in the definition of manslaughter, in any book or authority that has been read, except in the charge of Chief Justice Parker of Massachusetts, in the case of *Selfridge*, who was tried before him, on a charge of having feloniously killed young Austin. But it is not doing justice to the acknowledged ability and learning of Chief Justice Parker, to consider him as giving in this instance an abstract definition of the crime of manslaughter. In that case there was no question as to the killing having been wilful; it was acknowledged to have been so. The accused, when the deceased made an attack upon him, shot Austin with a pistol, wilfully discharged, with an intent to kill, or at least to wound: and the defence was, that the accused was excusable in doing so, because it was necessary for his self-defence. Whether the killing must be wilful or not to constitute the crime of manslaughter, was not in that case argued by the counsel or presented to the consideration of the court. We may therefore consider the judge as giving a definition of the crime as applicable to the particular circumstances then in controversy, and not an abstract definition that should be applicable to all cases. Or in other words, we may suppose the Chief Justice as giving the jury all the information it was necessary for them to have in such case, as to the nature of the crime. He therefore tells them that unlawfully and wilfully to kill is manslaughter: but we never can, in opposition to every other authority, and to every author who has given us an abstract definition of manslaughter, suppose that the judge meant to be understood that a party could not in any case be convicted of this crime, unless he had an intention to kill. It is true, the will of the party, in most instances, must necessarily co-operate in the perpetration of the crime. That is, the act which is the *mediate* cause of the death, must generally be a wilful act; but if that act was unlawful, the party may be guilty of manslaughter, though death or even bodily harm was not intended. But to say as has been said by the prisoner's counsel, that the immediate act which occasions the death, must in all cases be voluntary to constitute the crime of manslaughter, I am sure is a mistake. For, suppose the pistol of a burglar, while he is robbing a house, should be accidentally and involuntarily discharged, and thereby one of the inhabitants of the house be killed, can it be doubted but that this would be a felonious homicide?

The authority of Chief Justice *Parker* has been so much relied upon and so earnestly pressed on your consideration by the counsel for the prisoner, that I have thought proper thus far to notice it in this early stage of my address to you, though it is not my intention just now to direct your attention to the law of homicide, necessarily involved in the verdict you are to pronounce. I shall, in the sequel, again refer to the case of *Selfridge*. I think you will better understand my observations on the law of this case when you shall have heard those I mean to offer to you on the evidence.

To support this indictment, the death of the person alleged to have been killed, must be proved: and it must be proved that he was killed by the instrumentality of the prisoner at the bar, by means at least of the nature of those charged in the indictment.

As to the first point, it is not necessary that I should detain you a moment. It is too true that the unfortunate Stoughton is no more.

The next question is, when and how did he come by his death?

I shall not attempt to recapitulate particularly the testimony of the many witnesses who have been examined, or to assist you in endeavouring to reconcile the many apparent contradictions of the witnesses. They seem calculated to shake our faith in all human testimony. I am sensible that I have not now strength for a task which would require so much time and labour. Were I to endeavour to perform it, I fear my omissions or mistakes might do injustice to the one side or the other.

I shall, therefore, only ask your attention to certain prominent facts, which I think may be considered as incontestibly proved. They are testified by most of the witnesses, and are not positively or affirmatively contradicted by any.

It is proved by the testimony of Major Smith, that the prisoner possessed himself of the fatal weapon the evening before his mortal rencounter with the deceased. That at the earnest solicitation of the prisoner, the witness gave it to him in exchange for a cane that the prisoner before carried, which had no sword in it. This testimony was introduced on the part of the prosecution, unquestionably to show that the prisoner had premeditated an affray with the deceased, and had armed himself with this instrument with a view to it. But the testimony of Major Smith is in opposition to such an inference. He says the prisoner was going to Baltimore the next day, or soon thereafter: and that he expressed a desire to have it from the witness as a keepsake. In the absence of all testimony to the contrary, we are bound to believe he had no other motive. And the affray and the obtaining of the weapon are no otherwise connected than in point of time. I only advert to it as corroborative evidence of what has been shown by the testimony of several other witnesses, that is to say, Cambreleng, Weed, and M'Gowan, that the prisoner had the weapon in his hands immediately before, and at the commencement of the affray. The fact, that the prisoner after he saw that the dagger had with the first blow, been forced partly out of the cane, either drew off the sheath or suffered it to fall off, and took the blade in his hand, has been ad-

verted to by the counsel on both sides. It will evidently admit of two interpretations: it may either be considered as indicating a caution in the prisoner to guard against the mischief likely to ensue, if he had continued to use it as he then held it; or it may be taken as indicating a design in the prisoner the more effectually to avail himself of this mortal weapon. I shall leave the jury to draw their own conclusions from what they may recollect of the testimony in this point. It must be remembered, that Mr. Weed testifies very positively that the sheath flew off by the force of the first blow.

It is also proved by the testimony of those three last named witnesses, and also by the testimony of most of the other witnesses in the cause, and certainly by the testimony of Weir, Haycock, Ball, and Phelps, that the prisoner used the cane either sheathed or unsheathed, during the affray and up to the moment when the deceased fell the first time.

And lastly, it is proved by several of the witnesses, that after the deceased fell the first time and had risen, or been raised by the assistance of the bystanders, the prisoner had the dagger unsheathed in his hand. After the deceased had fainted, Mr. Leonard Baker saw the prisoner looking at the dagger, he thought, with much surprise, and thinks he saw him throw it away, or give it away. Mr. Weir saw him have it in his hand, and heard him say, "I did not mean to draw this." Mr. Ball saw the prisoner swinging the sword-cane between his thumb and finger after the deceased had fallen. Mr. Clark saw the weapon in the hand of the prisoner, while he was standing between him and the deceased, immediately after he had separated them and the deceased had risen. He did not see the sword or cane in the hand of the prisoner at the commencement of the affray or during its continuance. Indeed, according to his testimony, we could hardly believe that the prisoner had this sword in his possession at the onset, because Mr. Clark says he gave the blow which knocked the deceased down with his right fist. We all know the high respectability of Mr. Clark, and how impossible it is that he can intend to represent any thing otherwise than as he believes to be true. He supposes that he saw all that passed from the very commencement to the end of this unhappy rencounter. Yet it is manifest that he did not, or Mr. Weed, Mr. Cambreleng, Mr. M'Gowan, and most of the other witnesses, must be mistaken. Indeed it must be very unfavourable to the prisoner to suppose that Mr. Clark cannot be mistaken as to the commencement of the affray, for if he were not, then the prisoner commenced the affray by a violent and totally unjustifiable assault and battery on the deceased.

There is one part of the transaction to which there is a contrariety in the testimony of the witnesses, and that is as to the prisoner's having beat the deceased about the head with the but end of the dagger after the deceased fell the first time. This is a matter which, if you should think it important to your final decision, I shall leave entirely to your consideration and determination.

From the testimony on these points, and from that to which I shall presently more particularly direct your attention, you will have to decide, if you should think it necessary for you to do so, whether the deceased received his mortal wound from a blow with the dagger voluntarily given by the hand of the prisoner during the affray, or whether the deceased was accidentally pressed upon the dagger while the parties were up and the contest continued; or whether in consequence of the prisoner's having dropped or thrown away the dagger before the deceased was knocked down, the deceased, by a blow or violence from the prisoner, fell upon the dagger and so received the mortal wound.

It is my painful duty to say, that if you come to a conclusion that the death of the deceased was occasioned by either of these means or in either of these ways, you may find the prisoner guilty of the crime of which he is accused. Whether the death occurred in one or other of the ways I have mentioned, is, as to the question whether the killing be manslaughter or not, in my judgment, totally immaterial.

Whether the prisoner intentionally planted the dagger in the heart of his adversary, or whether the deceased came by his death by being cast on the dagger by the prisoner, without any design on his part to inflict a wound, unquestionably makes a vast difference as to the moral guilt of the prisoner; and so it does as to his legal guilt. For if he intentionally stabbed the deceased under the circumstances of this case, then, gentlemen, he is undoubtedly guilty of murder. It is only the supposed want of this evil and felonious intention that could, under the circumstances presented by the testimony we have heard, have mitigated the accusation to that of manslaughter.

I feel myself bound to say, that the opinion I give that the prisoner may be guilty of manslaughter, although the deceased may have received the mortal wound in one or other of the ways I have mentioned, is an opinion in which, after all the research and consideration I am capable of, I give with confidence. I do not mean with an assurance that I cannot be mistaken, but I use this term to signify to you that *now* there are no doubts in my mind on the subject. If I were to tell you that I had doubts when I harboured none, it would be as criminal as if I were to advise you that the law was one way when I believed it to be another.

I shall yet forbear to present to your consideration the view I intend to offer you of the law applicable to this case. I shall here merely premise, that the question whether the prisoner has been guilty of manslaughter or not, may depend upon your deciding whether, when the mortal wound was received, the prisoner was acting lawfully or unlawfully. This will necessarily lead to a review and consideration of the circumstances of the case in some detail and with some particularity.

But here again I shall avoid adverting to any facts as to which I think it can be justly said there is any positive contradiction. I mean to refer only to the testimony of Mr. Cambreleng, and only

to such material facts of his testimony as are corroborated by other witnesses. It is true that he was called on the part of the prosecution, but it is obvious that he was the friend or intimate of the prisoner. It is also obvious that the affray was not a matter for which he was so entirely unprepared as the other witnesses evidently were. The expression he used, and those he heard from the prisoner before any blows were given, must have led him to expect an affray. We must therefore believe that he observed what passed with more attention and calmness than any other witness. And I must add, gentlemen, that the candid, cautious, and consistent manner in which Mr. Cambreleng has delivered his testimony, will, I presume, impress you, as it has me, with a perfect confidence, that he means to represent what he believes to be the truth.

He states that between two and three o'clock of the afternoon of 21st of December last, he and the prisoner left the City-Hotel in Broadway, where the prisoner lodged, to take a walk. That they walked up as far as Park Place, and then went back. That when they had arrived near the upper or northwardly side of Courtlandt-street, the witness perceived Mr. Stoughton below Courtlandt-street, coming up on the same westwardly side of Broadway, on which the witness and the prisoner were walking down. That the witness said to the prisoner, there is your friend Stoughton, or you will meet your friend Stoughton, (meaning his enemy, or at least his adversary no doubt) or words to that effect. That they were then forty or sixty yards from the deceased. The witness was walking on the inside next the houses, and the prisoner by him on the outside. That the prisoner took no notice of what the witness said to him; but when the deceased and the prisoner had arrived within about six yards of each other, the prisoner lifted his cane, not in a threatening manner as if he was going to strike, but scornfully pointing the small end at the deceased, and said, "there goes a coward and a scoundrel," or words to that effect. That the deceased took no notice of this, but continued his course till he came on a line, or nearly so, with the prisoner and the witness, when the prisoner again raised his cane in the same way, and repeated the same words, "there goes a coward and a scoundrel." The deceased passed on about two paces, and then turned and came towards the prisoner. The prisoner turned and faced him. The witness fearing an affray, to prevent it, took the prisoner by the sleeve, and desired him to go with him, or to go off, or to that effect. The prisoner turned to do so; the deceased followed them, and when they had moved a few feet, the deceased came up to the prisoner, accosted him, and asked him if he would repeat his words; to which the prisoner answered, "I will:" upon this the deceased made a blow at the face of the prisoner which took effect on his shoulder. The parties had at this time reached the lower or southerly side of Courtlandt-street, and were on the sidewalk, near the curbstone, at the corner of Weed's store, which forms the southwest corner of Courtlandt-street and Broadway. Upon receiving the blow from the deceased, the prisoner return-

ed it by a blow with the but end of the swordcane at the head of the deceased. The prisoner had the cane in his right hand, and held it by that part which made the scabbard of the sword. As the stroke was made with the swordcane, the sword flew out so as to show some part, three or four inches of the blade. The exposure of the blade seemed to attract the attention of both the combatants. The prisoner then took the hilt or handle of the swordcane in his left hand, and having let go the scabbard which he had held in his right hand, the scabbard came off; the witness supposed it dropped off when the prisoner let go his hold of it. The prisoner then shifted the sword from his left to his right hand, taking it in his right hand by the blade near the hilt or handle, so that the point and a great part of the blade was below his hand; while the prisoner was doing this, the witness thinks the deceased gave the prisoner several blows, but of this he would not speak with certainty. He spoke he said as to this fact, rather as of an inference which he drew from the situation of the parties, than from any positive recollection. As soon as the prisoner had taken the sword by the blade with his right hand, he struck the deceased over the head with the butt or handle. The first blow the deceased received from the cane in this way, caused him to give back, so that he stood with one foot down on the street or carriage way, and the other resting on the curbstone at the corner. The prisoner continued to strike, and gave the deceased several blows with the head of the sword in the same way; and the deceased to retreat about eight paces, till he arrived nearly at the middle of Courtlandt-street, and rather in Broadway, when he fell. The prisoner at the same time was in an incumbent posture over him. He seemed partly to fall, but did not lose his balance, and was not off his feet. The witness till this time remained on the sidewalk, on the southerly side of Courtlandt-street, and as the parties went from him, the distance between them and him was increased, and he could not so well see what passed. As the deceased retreated, he made use of his hands, not only to ward off the blows, but offensively, and to strike the prisoner, and manifested no intention or desire to give up the contest previously to his fall.

When the deceased had fallen, and the prisoner was over him in the incumbent posture described, the witness went up to them with an intention to separate them. But going up directly behind the prisoner, who had on a box coat with large capes, he could not well see what was passing on the ground. He saw no dagger in the hand of the prisoner. To say he saw the hand of the prisoner at this time, would be too particular, it might have been concealed by the capes of the prisoner's coat; but he is certain that he saw his right arm, and does not think he could then have been using the sword or dagger in any way. Mr. Cambreleng further stated, that he had a vague impression that about a minute after the deceased fell, he saw some one pick up the dagger and hand it to the prisoner.

Mr. Cambreleng also states, that in the first of the affray, and while the prisoner was changing the dagger from the one hand to the other, he thought also he had the best of the battle; but afterwards, and as soon as the prisoner began to use the butt of the cane, it appeared to him that the prisoner had decidedly the advantage, not because he was stronger in person than the deceased, they were nearly of equal strength, but because the prisoner seemed to know more about it.

It is a rule of law, founded upon reasoning which must be obvious to every one, that witnesses swearing affirmatively may be believed, although they should be opposed by a greater number of witnesses equally entitled to credit, swearing negatively; or in other words, where a person swears positively that a fact did exist, he may be believed, though many other witnesses may swear they did not see it. There are abundant instances in this case for the application of this rule. Take for example the testimony of Mr. Clark, to which I have before adverted. He did not see the first blow given by the deceased; he did not see the cane in the possession of the prisoner at the commencement of the affray, nor did he see it used during the contest. And yet we cannot doubt but that, as to these particulars, he did not see what really occurred.

I think, gentlemen, you must believe from the testimony of Mr. Cambreleng, corroborated as it is by the testimony of other witnesses in the cause, that from the moment the prisoner began to strike with the head of the cane after it was unsheathed, he had the advantage of the deceased: that though the deceased returned the blows with his fist, he was from that moment retreating, and that while he was retreating, the prisoner continued to use the weapon by striking the deceased with it till he fell. I shall refrain from making any observations on the testimony of the physicians. If you take the testimony of Doctor Mott, then it follows that it was impossible the deceased could have received the wound otherwise than by falling on the dagger. But you will recollect the opinions of several other medical gentlemen in opposition to that of Doctor Mott; and I must leave you to draw such conclusions from this conflicting testimony as you may think proper. It is a little singular, that the two medical gentlemen who were called to examine the body, with a view to their being witnesses on this occasion, should differ even in their descriptions of the wound.

With these observations on the testimony, I shall now endeavour to state and explain to you so much of the law of homicide as it appears to me necessary you should understand, to enable you to render, as you are bound to do, your verdict according to law. You have been reminded with great earnestness, that you are in this and every criminal case, judges of the law as well as the fact. It is with great satisfaction that I can charge you that this is your province. You are sworn to render your verdict according to the evidence as applied to the law. You must be as conscientiously satisfied as to the law as to the fact. In this respect, the members of the court are but your constitutional advisers: and if you do not

believe the law to be as it is stated to you by the court, if you cannot assent to the reasoning of the court as to the law, or are convinced by the reasoning of the counsel that the bench is mistaken with respect to the law, it is your duty to act according to the conscientious convictions of your own understandings. I should not in this case, as I seldom do in any case, have failed to have stated this to the jury. It is a consolation to me to think that any errors I may make either as to law or fact in the discharge of the duty I am now performing, may be corrected by your good sense and discretion.

The law of homicide, and of course the law of manslaughter, is the same that it was in this country on the 19th of April, 1775. By the constitution of our state, it is declared that such parts of the law of England and of the then province as formed the law of the colony on that day, should continue to be the law, unless it was altered by the legislature. The legislature has made no alteration in the law of homicide, except in respect to the punishment. As the law now stands, the crime of manslaughter must be punished in all cases with at least three years imprisonment in the state prison. I have no hesitation to say, that I do believe this never was intended by the legislature, but that it is the result of careless revisions of several sections of different laws to which we must refer to ascertain what is the punishment prescribed for this crime.

As the crime of manslaughter may on the one hand be so nearly allied to the crime of murder that there may be but little difference between the moral guilt of the one and the other, so on the other hand the crime of manslaughter may approach so nearly to excusable homicide that there may be but a shade of difference between them. It is for this reason that the punishment of this crime was by the English law, when we adopted it, left almost entirely to the discretion of the judges, and the court might pass a sentence which was in fact but a nominal punishment. I cannot believe, therefore, that the legislature of our state have foreseen that their enactments would oblige their courts in all cases of manslaughter to pronounce a judgment which must subject every person found guilty of this crime not only to a severe, but a disgraceful punishment.

But it is not our province to inquire what the law ought to be, but what it is; and we are bound to administer the law as it is. You are to say on your oaths whether or not, according to the law as it exists, the prisoner has been guilty of the crime with which he is charged, and your verdict never can in the least depend on the consideration of what will be the consequences to him if you should find him guilty.

We having adopted that part of the common law of England which relates to homicide, must resort to that law for a definition of the crime of manslaughter. We must resort to this law of our ancestors not only in this instance and for this purpose, but without it we should, in every stage of judicial proceedings, be without a guide. We have no other authority by which we can

establish what shall and what shall not be considered as murder; we cannot ascertain what constitutes a felony or a larceny without appealing to the common law of England. I am not an eulogist of this law, but I may say that we derive from it our most sacred and valuable institutions. It is the common law of England that has established the trial by jury; it is under that law that the prisoner now appeals to you as to his country, as to his guilt or innocence; and it is under that law that you are authorised to determine that appeal as you may believe the law and fact to be.

By the common law of England, which is now our common law, manslaughter, as I have before represented to you, is defined to be, "unlawfully killing a person without malice expressed or implied." If there be malice, then the crime is murder. What constitutes or is evidence of malice, would be, when the prisoner is only charged with manslaughter, foreign to our present inquiries.

If it has been proved that the prisoner killed the deceased, or in the words I have previously adopted, if it has been proved that the deceased came to his death by the instrumentality of the prisoner, then the killing will be at least manslaughter, unless the prisoner can show by testimony that he has himself produced, or by the testimony brought forward on the part of the prosecution, that the killing was not unlawful. He has not done this, unless the testimony has satisfied you that, in taking the life of the deceased, he was either justifiable or excusable. And this leads us to a consideration of these two species of homicide. In other words, we are to consider when, according to law, a homicide shall be considered as justifiable or excusable.

A homicide is justifiable when a person is put to death either by the command of the law, as when an officer duly inflicts a capital punishment, or by permission of the law.

Homicide permitted by law, is for the advancement of justice, as to prevent an escape, quell a riot, &c.—or for the prevention of crime. If an attempt is made to perpetrate a crime which in itself was capital, and punishable with death by the common law, if the accomplishment of that crime cannot otherwise be prevented, the law permits it to be done by slaying the offender.

I shall not, gentlemen, dwell on this branch of the subject, because it has not, I believe, been suggested by the counsel for the prisoner that the killing of Mr. Stoughton was a justifiable homicide, according to the legal acceptation of these terms. Indeed there could be no ground for such a suggestion, because there is nothing that would for a moment lead us to believe that the deceased intended to commit a felony. No one can believe that when, unarmed as he was, he struck the prisoner and engaged with him in the fatal affray, armed as the prisoner was, that the deceased could have contemplated the possibility of his taking the life of the prisoner; or that the prisoner could have had any just fears of such an event.

The counsel for the prisoner have put his defence, as it appears to me, on other grounds: they have endeavoured to convince you

that the killing of the deceased was not justifiable, but that it was excusable.

This requires of us a more careful and particular consideration of this species of homicide than I have thought it necessary to bestow on those kinds of homicide I have already noticed.

Excusable homicide may be where the killing is either without the will of the slayer, or it may be where the killing is intentional.

Involuntary excusable homicide is where one who is engaged in a lawful act, in the execution of that lawful act, happens, by mere accident and without any intention on his part, to kill another. This is also called homicide *per infortunium*, or misadventure. It is an essential quality of this species of homicide, that the act which immediately caused the death was lawful; if it were otherwise, then the killing cannot be excusable homicide. As an exemplification of the law on this branch of our subject, let us refer to some of the very numerous cases which have been read to you. A person was chopping with an ax; the iron flew off and killed a bystander. This was excusable homicide, because chopping the wood was a lawful act, and there was no intention to kill. But if the slayer had been chopping at his neighbour's door to get into his house to commit a felony, or even a trespass, no doubt the killing would have been at least manslaughter, because the slayer was engaged in an unlawful act. So a person shooting at a mark on his own ground, happened to kill another, and was held excusable. But if he had been trespassing on his neighbour when he caused the death by this means, he could not have been excused.

A parent correcting his child with a fit instrument for chastisement, with moderation, would be excused, though by some improbable accident, as hitting the child on the eye or on the temple, death were to ensue, because it was lawful for him moderately to correct his child. But if he had given the child blows with an improper instrument, such as a bar of iron, a heavy rope or a club, and the child died in consequence, the parent would be guilty of manslaughter at least; because it was unlawful for him to strike a child with such an instrument.

But as strong a case as can be put to illucidate that branch of the law which I am now endeavouring to explain to you, is that of the boxing match. Two farmers, prizefighters, according to the inhuman practice of England, fought for a purse. The one, with a blow of the fist given in the course of the fight, killed the other. He was convicted of manslaughter; because, however the art of pugilism may be sanctioned by the barbarous fashion of the country, it was against her laws.

It seems to me that these, and indeed all the other numerous authorities which have been cited, establish, that a man cannot avail himself, when charged with a homicide, of the plea of misadventure or accident, if it appear that the misadventure or accident happened when he was engaged in an unlawful act.

And this brings us to consider more particularly the question I have before surmised: that is to say, whether the prisoner, when the mortal wound was received, was acting lawfully or unlawfully.

Notwithstanding the testimony of Mr. Clark, I presume, gentlemen, you cannot hesitate to believe that the deceased gave the first blow, but it does not follow that it was lawful for the prisoner to return that blow. It does not follow that it was lawful for him to return it with the formidable weapon which the prisoner held in his hand; the sword was then unsheathed. And much less does it follow that it was lawful for the prisoner to follow with repeated blows, with the butt end of the drawn dagger, his retreating adversary, till he had felled him to the earth. But I shall have occasion more fully and particularly to discuss the lawfulness of the prisoner's conduct under the next division of the subject, as I shall submit it to your consideration. In the mean time allow me to notice an argument which has been suggested by the prisoner's counsel: that it was lawful for the prisoner to return the blow of the deceased; because, if the deceased had survived, and had instituted a civil action of assault and battery against the prisoner, he could not have recovered in such an action, however he might have been injured, if it appeared that the deceased struck first. The law is certainly so; but the inference, that therefore it was lawful for the prisoner to return the blow, is in my mind totally incorrect. If a man brings an action of assault and battery, the defendant may plead *son assault demesne;* which is, that the plaintiff committed the first assault; and if he can prove or maintain this plea, the action will be dismissed; not because the defendant may not have returned the assault unlawfully, but because the just policy of the law will not suffer a party in a civil suit to receive pecuniary damages for an injury which he himself invited, or for violence which was occasioned by his own wrongful act or provocation.

But, that a first assault will not always justify a consequent assault and battery, is established by the well-known and well-established maxim of criminal courts, that every assault will not justify every battery. It is upon this principle that we here frequently convict both parties to an affray, in what are called cross indictments of an assault and battery. That is, we convict both the person who committed the first assault, and he who was first assaulted, if he beat his antagonist with more violence than was necessary to protect himself and repel the attack. It is true, courts and juries are not very nice in measuring the force that may be lawfully used in repelling a first aggression of this nature; but nevertheless it is well established, that no more is lawful than is absolutely necessary for self-defence. It is manifest, that if the law were not so, the most brutal violence might go unpunished, if the slightest insult, by laying hands in ever so light a manner, might be returned by unmerciful blows and wounds to any extent; the law, instead of sanctioning self-protection, would countenance malice and revenge.

With these observations on this point, I submit it to you, gentlemen, to determine whether the deceased can be said to have come to his death by misadventure.

The second species of excusable homicide is, where the killing may be intentional or voluntary, but is excused, because it was necessary for the slayer to take the life of his antagonist, to preserve his own life, or to protect himself from bodily harm. This is what is called in law language *chance-medley*, or *homicide se defendendo*.

But to render this plea availing, the slayer must show that he had at least probable grounds to believe that the attack of his adversary put his own life in danger, or that it exposed him to great bodily harm; and that he had no probable means of saving the one, or avoiding the other, without putting his assailant to death.

But so cautious is the law in admitting this plea of self-defence, that it requires that the slayer, before he resorts to these fatal means of protecting himself, should manifest the necessity of doing so, by retreating so far as the fierceness of the attack, and a due regard to his own safety, will permit. It is true that the assault may be so sudden, violent and dangerous, as not to leave the party a moment's time for reflection or retreat; and a blow returned under such circumstances, though it proved fatal, might be excusable. But unfortunately we have not here to consider how far a single return blow might be lawful; but we are to inquire whether it was lawful for the prisoner, armed as he was with that dangerous weapon, which has been so often exhibited to you, to follow up his retreating and unarmed adversary with blow after blow. You will have to decide, gentlemen, whether the prisoner had any reason to fear the loss of life, or even bodily harm, from the attack of the deceased; and whether if he had, he showed any disposition to save himself, or to avoid a contest, by retreating. Upon these points I must refer you to the testimony of Mr. Cambreleng; who, so far as it relates to these questions, is, in my opinion, uncontradicted and unimpeached.

I shall, gentlemen, read to you some passages from a book, which I believe has not been cited by the counsel on either side, and yet none is of higher authority: and no author has, in my opinion, given us the law on this subject more amply or more perspicuously. Researches have been made in writers of the most distant times for the law of homicide, while, in my opinion, all that we can desire on this occasion, might be drawn in its utmost purity from this modern source. You will find the author stating with the utmost exactness, that the circumstance which makes the distinction between excusable homicide in self-defence and manslaughter is, whether the slayer was combating or not when he occasioned the death; if he were combating and not necessarily for his own defence, then it is not excusable homicide, but is manslaughter. I refer to the 4th book of *Blackstone's Commentaries*, pages 183, 184, 185, 190, 191, 192.

"2. Homicide in *self-defence*, or *se defendendo*, upon a sudden affray, is also excusable rather than justifiable by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a capital crime; which is not only a matter of excuse, but of justification. But the self-defence which we are now speaking of, is that whereby a man may protect himself from an assault or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*, or (as some rather choose to write it) *chaud-medley*; the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion: both of them of pretty much the same import; but the former is in common speech too often erroneously applied to any manner of homicide by misadventure. This right of natural defence does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.

"It is frequently difficult to distinguish this species of homicide (upon *chance-medley* in self-defence) from that of manslaughter, in the proper legal sense of the word. But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer hath not begun to fight, or (having begun) endeavours to decline any farther struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. For which reason the law requires, that the person who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honour; because the king and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves. The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him: for it may be so fierce as not to allow him to yield a step without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice, as well as of the municipal law.

"And, as the *manner* of the defence, so is also the *time* to be considered: for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence.

"1. Manslaughter is therefore thus defined, the unlawful killing of another, without malice either express or implied: which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act. And hence it follows, that in manslaughter there can be no accessaries before the fact; because it must be done without premeditation.

"As to the first, or *voluntary* branch: if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter; and so it is if they upon such an occasion go out and fight in a field; for this is one continued act of passion: and the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter.

"The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure, in this: that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the king's command, and one of them kills the other, this is manslaughter: because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischief. So where a person does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village where a few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder if he knows of their passing, and gives no warning at all, for then it is malice against all mankind. And, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter according to the nature of the act which occasioned it. If it be in the prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter."

The case of Mr. *Selfridge*, who was tried before Chief Justice *Parker*, has been referred to by the counsel for the prisoner, with high and just commendations on the learned judge who presided on

that occasion. I shall read you some passages from the report of that case, that you may the better understand it.

(The mayor read the following passage from the charge of the chief justice :)

" The counsel for the defendant seem to deem it of little importance to ascertain whether the blow was given before the pistol was discharged or not, as there is evidence from all the witnesses, that an *assault*, at least, was made by the deceased, before the pistol was fired. I think differently from them upon this point. When the defence is, that the assault was so violent and fierce that the defendant could not retreat, but was obliged to kill the deceased to save himself, it is surely of importance to ascertain whether the violent blow he received on his forehead, which at the same time that it would put him off his guard, would satisfy him of the design of the assailant, was struck before he fired or not.

" I doubt whether self-defence could in any case be set up where the killing happened in consequence of an assault *only*, unless the assault be made with a weapon which, if used at all, would probably produce death.

" When a weapon of another sort is used, it seems to me that the effect produced, is the best evidence of the power and intention of the assailant to do that degree of bodily harm, which would alone authorize the taking his life on the principles of self-defence.

" But whether the firing of the pistol was before or after a blow struck by the deceased, there is another point of more importance for you to settle, and about which you must make up your minds, from all the circumstances proved in the case ; such as the rapidity and violence of the attack, the nature of the weapon with which it was made, the place where the catastrophe happened, the muscular debility or vigour of the defendant and his power to resist or to fly. The point I mean is, whether he could probably have saved himself from death or enormous bodily harm, by retreating to the wall, or throwing himself into the arms of friends who would protect him. This is the *real stress* of the case. If you believe, under all the circumstances, the defendant could have escaped his adversary's vengeance, at the time of the attack, without killing him, the defence set up has failed, and the defendant must be convicted.

" If you believe his only resort for safety was to take the life of his antagonist, he must be acquitted, unless his conduct has been such prior to the attack upon him, as will deprive him of the privilege of setting up a defence of this nature. It has, however, been suggested by the defendant's counsel, that even if his life had not been in danger, or no great bodily harm, but only disgrace was intended by the deceased, there are certain principles of honour and natural right, by which the killing may be justified.

" These are principles which you as jurors, and I as a judge, cannot recognize. The laws which we are sworn to administer, are not founded upon *them*.

"Let those who choose such principles for their guidance, erect a court for the trial of points and principles of honour; but let the courts of law adhere to those principles which are laid down in the books, and whose wisdom ages of experience have sanctioned. I therefore declare it to you as the law of the land, that unless the defendant has satisfactorily proved to you, that no means of saving his life, or his person from the great bodily harm which was apparently intended by the deceased against him, except killing his adversary, were in his power, he has been guilty of manslaughter, notwithstanding you may believe with the grand jury who found the bill, that the case does not present the least evidence of malice or premeditated design in the defendant to kill the deceased or any other person.

"I ought not to rest here; for although I have stated to you that when a man's person is fiercely and violently assaulted, under circumstances which jeopardize his life or important members, he may protect himself by killing his adversary; yet he may from the existence of other circumstances proved against him, forfeit his right to a defence which the laws of God and man would otherwise have given them.

"If a man, for the purpose of bringing another into a quarrel, provokes him so that an affray is commenced, and the person causing the quarrel is overmatched, and to save himself from apparent danger kill his adversary, he would be guilty of manslaughter if not of murder, because the necessity being of his own creating, shall not operate in his excuse."

I had intended, gentlemen, to read you other passages from this book, but I find myself so fatigued and exhausted, that I must endeavour, as far as I possibly can, to abridge the task in which I am engaged. I shall, therefore, trust to my memory to give you the outlines of that case, that you may see that it was as different from this as almost any other case could be.

Mr. Selfridge had been offended with Mr. Benjamin Austin, the father of the young gentleman who was killed, in consequence of which, Mr. Selfridge posted the father, by publishing in the papers an advertisement in very harsh terms. Mr. Selfridge learned that the father had said that he would not have any altercation with Mr. Selfridge himself, but that some one would take him in hand who could handle him. Mr. Selfridge considered this as an intimation that he was to be attacked; and when he went out on his ordinary business, he put a loaded pistol into his pocket. Mr. Selfridge was a feeble man. As he was going to the exchange, he was attacked in the street by young Mr. Austin, who suddenly rushed upon him with a cane with which he made a blow at the head of Mr. Selfridge, on which Mr. Selfridge drew his pistol and shot the assailant. There was some contradictory testimony whether Mr. Selfridge received the blow on his head before the pistol was fired, or whether he fired as Mr. Austin was striking the blow. Mr. Selfridge, however, received a large contusion on his forehead, and the

blow was with so weighty an instrument and with such force, that it made a considerable opening in his hat. It was left to the jury in that case to determine whether the attack was not such a one as put the slayer in danger of life, or of great bodily harm: and whether it was not so sudden as to render a retreat impossible, consistently with the safety of Mr. Selfridge. The jury must have found affirmatively on these points, and therefore acquitted Mr. Selfridge, on the ground that the homicide was excusable in self-defence. The same points are referred to you now, gentlemen, but I regret to say, upon a totally different state of facts.

There is one other rule of law which, anxious as I am to conclude, I feel myself bound to notice: it is, that the slayer shall not be permitted to avail himself of the plea of self-defence, if he designedly provoked the deceased to make the first assault. To this point several authorities have been read to you. You have already heard the opinion of the court, gentlemen, that the prisoner did not commit an assault by pointing his cane at the deceased when they approached each other, because there was nothing in that action which indicated that the prisoner had an intention to strike the deceased at that moment: but nevertheless, when the prisoner accompanied that scornful action with the reproachful and insulting words, "there goes a coward and a scoundrel"—when he repeated this action and these words at the very side of the prisoner, can we say he did not provoke the deceased to assault him?

If, gentlemen, the principles of law be as I have stated them to you, then it is immaterial as to the verdict you are now to render, whether the wound was given while the deceased held the dagger in his hand, or whether during the affray the prisoner dropped or threw away the sword, and the deceased, in consequence of a blow or violence from the prisoner, fell upon it.

I say, in my opinion, it will make no difference whether the deceased came by his death in the one or the other of these ways; since the question is, whether the slayer be guilty of manslaughter, or not guilty, and not whether he be guilty of manslaughter or murder. If killing without an intent to kill, in the execution of an unlawful act, be manslaughter, then it is immaterial by what means the death is produced, so it immediately proceeds from the unlawful act. Suppose two men were fighting, and one should knock the other down, and by his fall on a stone he should fracture his skull, and he thereby lose his life, can it be doubted but that it would be manslaughter? One man knocks another off a stoop, or out of a window, and death ensues in consequence of the fall: no question but it would be manslaughter, although it should ever so manifestly appear there was no intention to kill.

But if you should be of opinion that the deceased came to his death by falling on the dagger, then, as you heard me state in an early stage of this cause, there is a technical question whether the prisoner can be convicted on this indictment, though he should have thus committed the crime of manslaughter.

This indictment, in every count, charges that the prisoner inflicted the wound with a sword or dagger held in his hand, and the question is, whether the testimony will support the indictment, if it proves that the wound was not given by the prisoner's hand, but received in the fall.

After the best consideration I have been able to give this subject, the doubts I had have been removed, and I now believe the indictment may be supported by such proof. The rule of law is, that the indictment and proof must correspond as to the *nature* or kind of death. A variance as to the particular manner is immaterial. Thus, as you may have learned from the authorities which have been read to you, where the indictment charged the wound to have been given by a sword, it was considered as supported by testimony, if it was given by a staff. So where the indictment charged the death to have been occasioned by the administring of one kind of poison, and it was proved that the poison was of a different kind, the slayer was convicted. But if the indictment charged the death to be by stabbing, it would not be supported by evidence that the deceased was drowned: nor if the charge was that he was drowned, would it be supported by evidence that he was poisoned: because these means of death are of a different kind or nature. In this case, the death is charged to have been occasioned by a wound with a sword or dagger, and as it is not disputed but that the deceased came by his death by such a wound, I think it immaterial whether the prisoner held it in his hand or not, provided his unlawful act occasioned the wound.

I have given my opinion or advice to you on the law points which have arisen in this interesting cause, without hesitation or reserve: I have felt myself bound to do so, when I in fact entertained no doubt as to the law. But that the prisoner may have the full benefit of the errors I may have committed, I have reduced to writing the legal advice I have given you, in the form of points, that my opinions may with the more facility be reversed by a higher tribunal. These I will now read to you:

POINTS.

1. The law of homicide, and of course the law of manslaughter, is the same as it was in this state on the 19th of April, 1775, so far as it has not been altered by acts of the legislature, subsequent to the adoption of the state constitution. And the legislature has passed no act on the subject that can affect this case, except in relation to the punishment, which the jury ought not to take into consideration.

2. If the prisoner intentionally gave the mortal wound while he was fighting with the deceased, and the prisoner was not in danger of life or great bodily harm, the killing may be manslaughter, though death was not intended, and though the deceased struck the first blow.

3. If the dagger fell from the hand of the prisoner, or he threw it down after it was unsheathed and he had used it to beat the de-

ceased, and while the prisoner was fighting with the deceased; and if while the prisoner continued to fight with the deceased, and the prisoner was not necessarily defending himself from loss of life or great personal harm, or just apprehension thereof, the deceased fell upon the dagger in consequence of a blow or violence offered by the prisoner, and so received the mortal wound, it may be manslaughter.

4. That although the wound be charged in the indictment to have been given with a weapon held in the hand of the prisoner, yet he may be convicted of the offence charged in the indictment, though the jury should believe he came to his death in the manner last supposed.

Testimony has been introduced as to the prisoner's conduct after the affray, and when he was arrested and brought for examination before me. I can only say, that I have perceived no evidence of any thing in the prisoner's expressions or behaviour subsequent to the death of the deceased, inconsistent with the defence now set up for him, that the wound was given without his intention or knowledge. And I feel it incumbent to state to you, that in all my official intercourse with him, he has conducted himself with great propriety: he has manifested a manly firmness, and at the same time a manly feeling. I have never, gentlemen, been able to look upon him, and cannot now look upon him, without the most sincere regret that he should be placed in the situation in which he stands.

I have now, gentlemen, nearly concluded the anxious and painful task I have had to perform. I will only add, that if you have any rational doubts as to the law or facts, you ought to acquit; but if you have not, you are bound to say, whatever pain it may cost you, that the prisoner is guilty. In the one case an offender may escape unpunished, in the other, you may have tearful eyes, but you will have peaceful hearts.

It was now a quarter past one o'clock; and as from the time the jury were to be given in charge to the officers sworn to keep them, they could not have any refreshment, the court proposed waiting till they should partake of something prepared for them by the care of the sheriff. They accordingly retired under the charge of two marshals, and returned at two o'clock, the court still waiting to receive them; and their names being again called over, the same two officers, together with Mr. Abraham Aston, one of the deputy sheriffs, were sworn, and their oath was this: "You shall go out with the jury who are sworn in this cause; you shall keep them together in some private and convenient place, without meat or drink; you shall suffer no person to speak to them or either of them, nor speak to them yourselves, nor to either of them, until they shall agree on their verdict, unless it be to ask them if they have agreed on their verdict, without being otherwise directed by the court."

The jury remained out till six o'clock of the following (Saturday) afternoon, when they announced to the court by one of the offi-

cers, that they were agreed on their verdict. The pressure and anxiety of the crowd was such, that the court took precaution to prevent any indecorous expression of feeling; and the mayor admonished the audience of the necessity of observing good order and silence.

The jury being now returned to the jury box, their names were called over, and they all answered as before.

Clerk. Gentlemen, have you agreed on your verdict?

Mr. Gordon, the Foreman of the Jury. We have.

Clerk. Robert M. Goodwin, prisoner at the bar, stand up; prisoner, look upon the jurors; jurors, look upon the prisoner. How say you, gentlemen, do you find Robert M. Goodwin, the prisoner at the bar, guilty or not guilty of the felony with which he stands charged?

Foreman. Guilty. But we beg leave to recommend him to the mercy of the court.

Before the verdict had been received and recorded, Mr. Hoffman, on behalf of the prisoner, prayed that the jury might be polled; and further, that they might be instructed by the court, that although they had joined in the general verdict given in by their foreman, they were still at liberty to dissent from it.

The Mayor. Gentlemen, what the counsel has said is true, and I will further add, that unless your consciences will justify you in the verdict given in by the foreman, it is not only your right, but your duty, to dissent, which you may do as you shall be separately asked.

Clerk. Gentlemen, you will have the goodness to pronounce your verdict separately, whether guilty or not guilty, as your names shall be called.

James Glass, how say you?

Mr. Glass answered, Guilty, but recommended the prisoner to the mercy of the court.

Clerk. Garrit Van Cleef, how say you?

Mr. Van Cleef—Guilty.

Clerk. John M. Seaman, how say you?

Mr. Seaman, (after some pause)—*Not Guilty.*

Mr. Hoffman. That is sufficient, sir.

The jury were then desired to retire, and reconsider of their verdict.

Mr. Hallet then asked, on behalf of himself and his fellow jurors, whether the jury might not have with them a correct minute of the testimony, either from the counsel or the court, as there were some points respecting which there were doubts among them: to which it was answered by the mayor, that the court would assist them as far as it could, but that they could not have recourse to the minutes of the counsel, which might differ one from the other.

The juror also requested a further explanation on these two points: 1st. As the indictment charged the death to have been caused by a thrust, and there was some evidence from which it might be inferred that it happened by the deceased falling on the weapon, if the jury should be of opinion that it happened so, or in any other way

than by a thrust, whether that would be a variance in the proof; and whether, taking that as the fact, it would sustain a verdict of guilty of the crime charged in the indictment?

2nd. Whether the prisoner was acting unlawfully when he returned the blow of the deceased; and whether they were so to understand the charge.

The Mayor. You are right, sir, in so understanding it: I did so charge you, gentlemen. The law in a criminal indictment is, that unless a man is assaulted so severely as to think himself in danger of life or great bodily harm, it is an unlawful thing to return the blow, as his recourse should be to the laws of his country for redress. But I do not think the case turned upon that; for however the law might be as to the returning a single blow, it was not lawful for the prisoner to follow up the blow when the deceased was retreating.

Mr. Hoffman wished to know whether that was the opinion of the court, or only of his honour the Mayor.

The Mayor requested the other members of the court to give their opinion.

Alderman Allen. I do not agree with the Mayor entirely. I do not think Mr. Goodwin was acting unlawfully in returning the blow, but I do think it was unlawful, when the deceased was retreating, to follow it up as he did.

Alderman Thorp assented to this opinion.

The Mayor. I do not see that we differ very materially.

The jury thereupon retired; the same marshals, together with Mr. Jacob Hays, the high constable, being sworn as before to take charge of them.

SATURDAY, MARCH 18th, 1820.

Half past 11 *o'clock, P. M.*

It being now within half an hour of the legal termination of the Sessions, the court sent to know whether the jury were agreed; and being informed they were not, they were sent for, and returned into court, and were again called over by their several names, and all answered.

The Mayor. Gentlemen of the jury, the court have received information that you are not yet agreed on your verdict: is it likely that you will be able to agree within half an hour, which is the latest period to which the court, according to law, can prolong its sitting?

A juror. There is not the least possibility of our agreeing.

The Mayor. Are we to understand that sentiment to be unanimous?

A juror. In that, may it please the court, we are all of one opinion.

The Mayor. Gentlemen, this is an unfortunate circumstance: the court, however, think that they have exercised their power of keeping you together as long as it is necessary or right; for this

power must have some limit, and the court some discretion in the exercise of it, otherwise it might sometimes prove intolerable to jurors. This court has its authority now but for a few minutes; and considering the multitude of anxious spectators, and the time of the night, it might not be prudent to suspend this proceeding till the very last moment. The court regret that they have been obliged to keep you so long, and in discharging you, think it a duty to thank you for the attention you have shown, and the services you have rendered during this painful session. Your present disagreement is no doubt honest, since no man has been willing to sacrifice his duty to his conscience.

The jury were now discharged.

MOTION TO BAIL.

Munro. May it please the court. I now renew my former application that the prisoner be admitted to bail, and I hope there can be no doubt that he is entitled to it. The whole evidence has been before the jury, and they cannot, upon that testimony, find him guilty. I pray, therefore, that he may be bailed, and in a very mitigated sum.

Van Wyck. I cannot consent to this application, not only because it is a surprise at this moment when there is no time to discuss the merits of it, but because it is founded upon what has just now passed in the court; whereas it appears to me, as far as any conclusion can be drawn from the circumstances, it must be rather against than in favour of the prisoner. The jury came into court with a verdict of guilty; upon a scrutiny, however, it appeared that they were not unanimous, and because they could not agree, they were finally discharged. It would lead the court too far at this late hour to go into the arguments and objections upon which we are certainly entitled to be heard.

The indictment shows that there is a probability of guilt. Can the court now say that there is any strong probability that this defendant will be, or ever ought to be, acquitted by a jury? The death of the man, the conflict with the deceased, the means of his coming by his death, all this is before the court, and upon such ample proof, that if it acts upon the principles which have always governed courts, it will not, I think, admit this prisoner now to bail. The court has already heard and examined all the authorities; it would be supererogation to repeat them, and needless to cite others.

Griffin. At this late hour, and fatigued as the court has been, I should not willingly enter into any discussion that would enhance the difficulty either of the court or of the counsel. On the former motion for bail I cited authorities establishing this general position, that in all cases where the prisoner was charged with felony of any description, he could not, by the law of the land, be bailed, unless circumstances existed that created a reasonable presumption of his innocence, and that the law required his person for security; and that money could not be substituted. I established that posi-

tion upon authorities going back above two hundred years, and upon principles that must operate in all civilized communities. The grand jury have found this prisoner guilty of a felony. Has any thing which has since passed negatived that charge?

The Mayor. It is too late to open this wide field of dicussion: if on your part you go into the merits and the evidence, the other side must have liberty to answer, and the night is too far spent.

Griffin. I will then submit it upon this single inquiry: where will the court find one circumstance tending to show that the prisoner is not guilty? If the presumption of his innocence does not naturally grow out of the testimony, nor can be inferred from no one part of it, then the great principle must govern. There is no reason for letting him to bail.

Wells. I have no wish to prolong this discussion, but I will state what I think conclusive, that the application was refused the last term, upon deliberate argument and more deliberate adjudication: then what has happened since? * * * * * *

Hoffman. Will the court hear more than two counsel on a side?

Wells. I only want to state one or two positions, and argue no further. I should have finished by this time if the counsel had let me proceed. The causes of the former refusal are in the recollection of the court. Has any thing happened to change the grounds? The prisoner has been brought to his trial, and the jury have not acquitted him. At the very least then, it remains as indifferent as before: the presumption of his guilt is not diminished, nor that of his innocence increased; and this trial cannot operate in his favour. I press it no further than to say, that it is as if no trial had taken place: and then how does this application differ from that made before the trial, when upon the most mature deliberation the motion was refused? This then being, as to the present question, a mere nullity, what other reason is there? where is the delay or default on the part of the people? where any new merits on the part of the prisoner, that should give him any new advantage?

Munro. The case certainly stands very differently now before the court, from what it did the last time it was moved. I then showed, and the court then decided, that it had power to bail: but it did not think proper to exercise that discretion, because the prisoner was charged with murder by a coroner's inquest. I then cited authorities to show, that where there is no charge but that of manslaughter, the court that has power to try or discharge, would not in such a case refuse to bail. Now, that the coroner's inquest is given up, that objection falls to the ground.

The Mayor. With respect to the law, I should be very sorry now to recommence an argument of 12 or 14 hours duration. We have the statute for our guide, that wherever a man is committed for petit larceny, or merely on suspicion of a felony, this court may admit him to bail. And further: this court has heretofore expressed an opinion, that where a prisoner of this court is charged with any felony which it is competent to try, it will use its discretion in granting or refusing to bail. But this discretion is not ar-

bitrary: it would be then despotism and tyranny. There must be circumstances to justify the court in the exercise of that discretionary power. Where there is a positive charge of felony, the court or judge may look into the testimony which has been given publicly to a jury, and if there appears a legal, probable, presumption of his innocence, they may bail him. Now it is said, that the prisoner is to be bailed in consequence of the proceedings of this jury: I think, however, that they do not alter the case; and it would be extraordinary that we should, from what has passed here before us, draw a different inference from what we did antecedently. Were I to give an opinion now, I could only say, that consistent with the principles of law which ought to govern the case, I never could consent. But I think it is too unreasonable at this moment, and under this pressure of time and occasion, to call upon the court for a decision which might oblige them to enter into another laborious investigation. There is the less necessity for it, as the prisoner is entitled to his *habeas corpus* before a judge of the Supreme Court, or before any officer or commissioner representing a judge of the Supreme Court. The depositions now before the court may be produced before the magistrate to whom this application may be made. I therefore give my opinion, that this application ought not to be complied with.

Alderman Allen. I differ with the Mayor. I think we are competent to bail. I view this case as I would one of petit larceny: and being competent to bail, I consider the case so far altered since the last application, as that we may change our former determination, though I do not wish to draw any pointed inference as to the guilt or innocence of the prisoner.

Alderman Thorp. I consider the cause of our former refusal, as not now existing in the same extent. The reason of our former refusal was a coroner's inquisition, which is no longer in the way, since the district attorney has declared that he does not mean to try the prisoner upon it; and since we before refused to bail the prisoner, he has been a month longer in gaol: for these reasons I am of opinion that he should now be admitted to bail.

Alderman Morss, who had taken his seat this day on the bench, was of opinion with the Mayor. The court being thus divided, the motion was lost.

And the court was adjourned till the first Monday of April following.

MONDAY, MARCH 20, 1820.

Mayor's Office, City-Hall.

This day the prisoner was brought before his honour the Mayor, at his public office, on a writ of *habeas corpus*, allowed by the honourable Peter A. Jay, Recorder of the City of New-York, returnable before the honourable Cadwallader D. Colden, Mayor, &c. And the writ being produced by the officer, the Mayor observed, that there was no return endorsed upon it. He suggested the form

of the return, and the keeper of the City Prison, Mr. Garrit Sickles, came and endorsed his return thereon, that the cause of the detention of the prisoner appeared by the schedules annexed: which schedules were, the commitment by the Mayor, on the 21st of December, for the murder of James Stoughton, and that of the Coroner on the 24th of December, on the same charge; and the writ was marked "*By the statute.*"

The Mayor then observed, that the writ being thus marked by the statute, appeared not to be a common law writ; and suggested whether, as the return showed that the prisoner was committed for felony plainly expressed in the warrant of commitment, the exception in the statute did not apply, and forbid his further interference; which must depend upon his having power to reject the words "*by the statute;*" and consider it as having issued at common law, which he seemed inclined to think he might do.

Another question was, whether the Mayor of the city of New-York had those powers which are given to judges of the common pleas, by the act passed April 20, 1818, vesting certain powers in the judges of the courts of common pleas. (*L. N. Y. vol.* 4. *c.* 173.)

And supposing the Mayor had by that act the powers of a judge of the supreme court, whether he could, in vacation, bail a person committed for felony, on a *habeas corpus* issued at common law.

And lastly, whether the Recorder, or any other magistrate, could issue a *habeas corpus* at common law, returnable before any other magistrate than himself.

The counsel professing they were not prepared to discuss these questions, the Mayor said he would adjourn the hearing till the next morning; and in the mean time examine the law on these points, and be better prepared to derive assistance from the arguments the counsel might then think proper to offer.

The prisoner's counsel said they wished, as far as it could be complied with, to dispense with forms, and have a decision on the right. They also asked whether his honour the Mayor would expect all the evidence of what passed before him at the trial to be again submitted to him.

The Mayor. I should wish every question decided on its merits; but though I might despise mere forms, yet I must be responsible for my acts: and if it be inquired hereafter why I bailed or refused to bail, it may be asked upon what evidence I proceeded. Now Mr. Emmet's notes may be one way, those of another counsel may be different—mine may be one way, and those of the Aldermen another; and a judge might as well go at once upon his own recollection.

Mr. Munro proposed that the counsel on both sides should consent to take the mayor's notes as the true statement of the facts.

The Mayor said he would have the less objection if the statute refers the matter to the district attorney, and he consents.

Van Wyck, District Attorney. This depends upon a preliminary question suggested by the mayor; and I must first know whether my presence is necessary. If this be a proceeding before a judge,

acting as a commissioner, I have no business here; I am only entitled to notice, in cases under the statutes which give the power of bailing to the first judge of the county, (see the *habeas corpus* act, 1 *R. L.* 356, and the act concerning the Courts of Common Pleas and General Sessions of the Peace in the several counties of this state, 2 *R. L.* 148.)

The motion was adjourned until the following morning.

It being thus adjourned, the mayor rose from his chair, wishing it to be understood that he no longer spoke as a magistrate acting officially, and suggested whether it would not be more advisable, under all the circumstances, to go to Albany and apply to a judge of the supreme court; which was approved of by the counsel, and the motion discontinued. An application was accordingly made to his honour Chief Justice Spencer, at Albany, who, as the reporter has been informed, recommended the deferring of the application till his arrival in the city of New-York, where he was to hold the Sittings before May Term, on the first Monday of April.*

The prisoner was accordingly brought before him, at his Chambers in Broadway, on Monday the third day of April, where

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**The following abstract of the several statutes conferring the powers of Judges of the Supreme Court of the State of New-York on inferior magistrates, may throw light upon the above discussion, and be useful to the students of our laws.*

* *By the "act concerning the Supreme Court,"* (1 *R. L.* 318. § 11.) Recorders of New-York, Albany and Hudson, are equally empowered with Justices of the Supreme Court, to act in all cases, both civil and criminal, in like manner as the said Justices may do out of court.

By Section 12.—Any Judge of any court of Common Pleas, and any Mayor, may take affidavits to be read in the Supreme Court.

By Section 13.—A Judge of the Court of Common Pleas may take recognizance of bail.

By an "*act to prevent unjust imprisonment, by securing the benefit of the writ of habeas corpus,*" (1 *R. L.* 354. *sec.* 12.) the First Judge of the Court of Common Pleas of any county of this state, has power, with the consent of the Attorney General or District Attorney, to let to bail as a Judge of the Supreme Court might do, and for such purpose, to grant writs of *habeas corpus*.

The "*act concerning the Courts of Common Pleas and General Sessions of the Peace, in the several counties of this State,*" (1 *R. L.* 141. *sec.* 14.) contains the like provision in the same terms.

By the "*act to vest certain powers in certain Judges of the Courts of Common Pleas, and for other purposes,*" (4 *L. N. Y. c.* 173. *sec.* 1.) any Judge of the Court of Common Pleas in this state of the degree of Counsellor, may exercise all the powers of commissioners appointed pursuant to the act to appoint commissioners to perform certain duties of Judges of the Supreme Court, passed 25th February, 1813, and all other duties which the Commissioners, by any subsequent act, are authorized to perform.

"*The act to appoint Commissioners to perform certain duties of Judges of the Supreme Court,* (1 *R L* 322.) being the act referred to in the foregoing section of the act of 1818, authorizes the appointment of a Commissioner for each of the Counties of Oneida and Ontario, who are authorized to perform all the duties of a Judge of the Supreme Court which, according to the practice of the said Court, the Judges thereof may perform out of Court in all cases, both civil and criminal; to allow writs of *habeas corpus*, and *certiorari*; to execute the absconding and absent debtors' act, and the insolvent act, in like manner as the Judges of the Supreme Court might allow and execute the same.

Messrs. Munro, Hoffman, Ogden, and W. Price, appeared on behalf of the prisoner, and Messrs. Wells, Griffin and Blake, on behalf of the people; and his honour the Chief Justice delivered the following opinion:

CHIEF JUSTICE SPENCER'S OPINION.

The People vs. Robert M. Goodwin.	*On Habeas Corpus—at Chambers in the City of New-York.*

The return to the writ sets forth two causes of detention; but it has been admitted by the district attorney, that the prisoner is to be considered as detained only on a charge of manslaughter. It appears that he has been indicted for that offence, and has been brought to trial in the Sessions in this city: that the trial was continued for five days, and that the jury, after having had the cause under consideration for about twenty-two hours, were finally discharged by the court, the jury declaring it as their unanimous opinion, that there was no expectation of their being able to agree. It appears that after the jury had been out about seventeen hours, they came into court, and by their foreman, declared themselves agreed on their verdict, and that they found the prisoner guilty, and recommended him to the mercy of the court; but on being polled, the third juror dissented from the verdict.

The district attorney avowed his readiness to proceed to trial again in the Sessions, within two days; but stated, that if it was the wish of the prisoner, he would remove the indictment and proceedings by *certiorari* into the Supreme Court. The prisoner's counsel declared their desire that the *certiorari* should issue; and also stated it to be their intention to insist before that court, that the prisoner could not be tried again for the same offence, the jury having been discharged without their consent. These are all the facts to guide my discretion in determining the question whether the prisoner is entitled to be bailed or not. And in deciding this question, little or no aid can be derived from the course of proceedings in this state; the point has never been discussed or decided at the bar, and the proceedings before the judges at Chambers, have never been collected or preserved.

With regard to the power of a Judge of the Supreme Court, to allow the writ of *habeas corpus ad subjiciendum* in cases not within the 31st *Charles* 2d, ch. 2d. (of which our statute is nearly a transcript) and to bail; the counsel for the prosecution distinctly admitted the existence of such a power. But I am unwilling it should rest on admission—the opinion of the twelve judges in England, on questions propounded to them by the House of Lords in 1757, is the best and highest evidence of this power. And as I understand their opinions, which will be found in Gwillim's Bacon, Title *Habeas Corpus*, they were unanimously of opinion, that since the statute of 31 *Charles* 2d, ch. 2d, and as the law then stood upon the practice of the King's Bench, writs of *habeas corpus ad subjiciendum* might

issue in all cases by a *fiat* from a judge of the King's Bench, returnable before himself. Seven of the judges are explicit on the question, that the power of a judge of the King's Bench, in awarding the writ, extends to all cases not within the statute. The doubts which have been entertained, whether, on the return of the writ, the judge was not bound by the return, so that the facts and circumstances of the case were not examinable beyond the return, have been removed by the act amending the *habeas corpus* act, passed the 21st of April, 1818; and it cannot now be doubted that a judge in vacation may examine into the facts contained in the return, and into the cause of the confinement and restraint.

Manslaughter is a felony, and it is punishable, on conviction, by imprisonment in the state prison for a term not less than three years, nor more than fourteen years. And it has been argued, that it being a felony thus punishable, it is a case in which the party accused ought not to be bailed, unless it be shown that there is a strong presumption of innocence. I am satisfied that the prisoner cannot demand it as a matter of right, to be admitted to bail, and that it is a question resting in the sound legal discretion of the judge awarding the writ.

Hawkins, b. 2d, ch. 15, § 40 and 80, lays down the law to be, that if it stands indifferent whether a person charged with a felony is guilty or not, he ought to be bailed; and that even in capital cases, where there is any circumstance to induce the court to suppose he may be innocent, they will bail—and that the judges will in general exercise the power of bailing in favour of a prisoner in every case not capital, though they will not exercise it when the prisoner is notoriously guilty, by his own confession or otherwise, without the existence of some special causes to induce it.

There are several cases in which persons charged with manslaughter have been bailed, where there has been no presumption of innocence. Thus in *Rex* v. *Dalton*, (2 *Str.* 911) the defendant was committed on a coroner's inquest for manslaughter, and was brought before Lord Raymond, chief justice, on *habeas corpus*, at his chambers. He held that if the depositions show that the offence was murder, he would not bail; but if it amounted only to manslaughter, he would bail; and he bailed the prisoner. So also in *Rex* v. *Magrath*, 2 *Str.* 1242, the defendant was committed for manslaughter, and it appearing to be no more upon the depositions taken before the coroner, the Court of King's Bench admitted him to bail. In Lord *Mohun's* case, which was before Lord *Holt*, at Chambers, (1 *Salk.* 104) he held, that if a man be found guilty of murder by the coroner's inquest, he is sometimes bailed, because the coroner proceeds upon depositions taken in writing, which may be looked into; otherwise, if a man be found guilty of murder by a grand jury, then the court cannot take notice of their evidence, which they are bound to conceal; and it appears by the cases before cited from *Strange*, that Lord Mohun was bailed first by *Holt*, and afterwards by the *Lords*, after an indictment for murder.

In some later cases, bail has been refused when the offence was a felony, punishable with transportation; as in 2d *D.* and *E.* 77, and 3d *East*, 157, and there is therefore no fixed or certain rule in cases of felony, each particular case depending on its peculiar circumstances. The object and end of imprisonment before trial and conviction, is to secure the forthcoming of a person charged with the commission of a crime; and it is never intended as any part of the punishment; for until the guilt of the party be legally ascertained, there is no ground for punishment, and it would be cruel and unjust to inflict it. The laws of every free government estimate personal liberty as of the most sacred character, and it ought not to be violated or abridged before trial; but in cases where there are strong presumptions of guilt, and although the nature and kind of punishment which awaits those whose guilt is legally established, does not alter the turpitude of the offence, it must enter into the consideration of the question of bail; for if the punishment would be a pecuniary infliction, then bail in more than the amount of the probable fine, answers every purpose: if the punishment be death or corporal imprisonment, a consciousness of guilt would probably induce to flight, and an evasion of the punishment; and in admitting to bail, therefore, regard must be had to the probable guilt of the party, and the nature of the punishment denounced.

It appears to me, that from the facts before me, the conclusion is inevitable, that it is quite doubtful whether the prisoner is guilty; and I think it stands indifferent whether he is so or not. After a long and laborious trial, the jury have not been able to agree, and what proportion of them were for convicting, and what for acquitting, has not been shown. No inference can be drawn from the fact that the foreman pronounced a verdict which was dissented from by the third juror, that all the other jurors were for convicting the prisoner; and it may well be that a bare majority of the jury agreed to the verdict as announced by the foreman; and I perceive that all the jurors viewed the case as of a mitigated character, by their recommendation of the prisoner to mercy. I must presume that the jurors were impartial, and that their final disagreement proceeded from a conscientious difference in opinion as to the prisoner's guilt; and I am therefore bound to conclude, that the prisoner may be innocent of the offence. In such a case, as I understand the law, he is entitled to be bailed, if he can give it in an amount, and by persons of sufficient ability, affording a reasonable expectation, from the impending forfeiture of the recognizance, that he will appear and stand trial.

It was urged that the adoption of such a principle would, in its operation, induce to the bailing of such persons as were either affluent themselves, or had rich and influential friends; whilst it would leave those who were poor and friendless in prison. Such may be the consequence, but it by no means proves the impropriety of the procedure. The rule is adapted to all who can comply with its terms; and it is the misfortune of those who cannot give the necessary security. In arrests for debt, bail must be given, or imprison-

ment is the consequence: and, although we may regret the inability to give it, we nevertheless approve of the law requiring security. I abstain from expressing any opinion on the suggestion of the prisoner's counsel, that he is not liable to be tried again for the offence imputed to him; that question will hereafter be considered by the Supreme Court.

On the whole, I think this a case in which it would be a discreet and sound exercise of the powers with which I am invested to admit the prisoner to bail; himself in $20,000, and four sureties of competent ability, in $5000 each, for his appearance at the next May term of the Supreme Court.

The bail was accordingly given, and the prisoner was discharged.

The prisoner was recognized to appear in the Supreme Court on the first Monday of May, himself in $20,000, and four sureties, to wit, Commodore Chauncey, Commodore Evans, Thomas Morris, Esq. Marshal of the Southern District of New-York, and Edward Price, Esq. in $5000 each.

MONDAY, MAY 1, 1820.

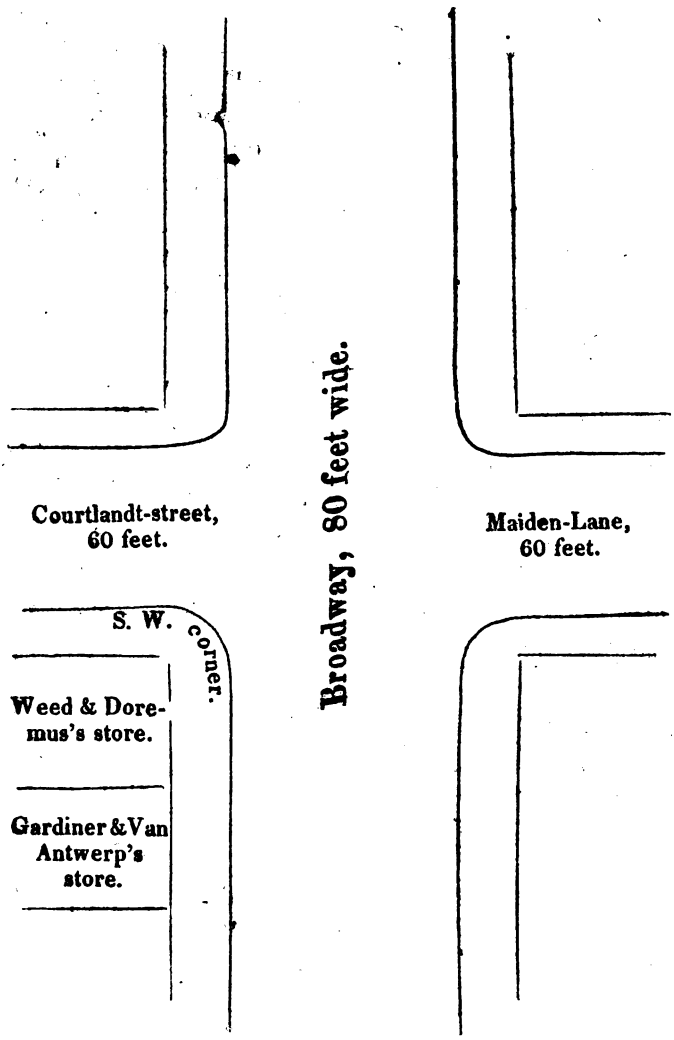
Supreme Court.

This being the first day of the term of the Supreme Court, the defendant appeared there pursuant to his recognizance. It was understood that his counsel meant to move for his discharge, and those for the prosecution to move for his trial at the bar of the court.

Mr. Van Wyck, district attorney, moved for a day to bring on the argument, it being proposed to bring it on upon a case to be made. It appeared that there were other cases in which indictments had been removed into this court by certiorari.

His honour the Chief Justice wished the counsel to consider whether this court had not power to send this cause to be tried at the Oyer and Terminer, by the judge who was to hold the sittings, as the public expectation would be much disappointed if a great part of the term should be taken up with a trial at the bar. And if this could be done, that the papers need not be filed till new recognizance be taken to appear at the Oyer and Terminer.

The court appointed Monday the eighth inst. for the hearing of the motion.


Courtlandt-street,
60 feet.
Maiden-Lane,
60 feet.
Broadway, 80 feet wide.
S. W. corner.
Weed & Doremus's store.
Gardiner & Van Antwerp's store.

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ERRATA.

Page 5, line 22, for "26th," read 24th of December.

Page 26, line 12 from the bottom, for "*Hunt*," read *Keat*.

Page 40, at the bottom, strike out the part repeated.

Page 121, line 32, after "Goodwin," insert, upon James Stoughton.

Ibid. line 2 from the bottom, for "indisputable," read indispensable.

The following incident was omitted. (See p. 181.)

Before the jury retired to reconsider their verdict, the prisoner, in person, requested permission of the Court to have his examination taken before the Mayor previous to his commitment, read, as he hoped it would explain the mystery that hung over the transaction. But the Court said it was too late now, and moreover, that it could not have been read on the trial, unless the prosecutor had introduced it.

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